

The Great Race of Courts

Civil Justice System Competition in the European Union

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De grote race van rechtbanken

Concurrentie tussen civiele justitiële systemen in de Europese Unie

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Chapter 1 Introduction

1.1 Around Europe in search of a court

1.1.1 A Grand Tour of Europe's courts

In October 2007, in an exclusive part of London, bodyguards were scrumming on the doorstep of a Hermes store.¹ The matter at stake was not a rugby competition, however, but US\$6.5 billion.² Inside the store, Boris Berezovsky was serving Roman Abramovich with a court writ. The two men had been associates in the privatisation of important assets of the aluminium and oil industries in the Russian Federation. They were part of a small group of Russian nationals – who came to be known as oligarchs – that had accumulated an enormous amount of wealth in a short period. The oligarchs had formed a small compact group, and exercised considerable political power over Boris Yeltsin, the president of the Russian Federation between 1991 and 1999. When President Vladimir Putin came into power in 2000, the seemingly compact group began to crack, and conflicts arose between members.³

While they were associates, Berezovsky and Abramovich had exchanged money and shares without documenting these activities. Based on this business relationship, Berezovsky claimed that Abramovich owned him a large sum of money related to the change of property in certain companies. Oral agreements, claimed Berezovsky, provided for specific payments that Abramovich was required to make to him. Berezovsky, however, could not – or was unwilling to – litigate in a Russian court for fear of persecution and an unfair trial. Because of problems with the Russian government, Berezovsky went into self-imposed exile in London, and was granted asylum in England prior to the start of the court proceedings. Abramovich was frequently in London because he was – and still is – owner of the Chelsea Football Club. These reasons seemed to justify Berezovsky's decision to initiate proceedings in England.

¹ Duncan Gardham, 'Berezovsky v Abramovich trial: Timeline' *The Telegraph* (31 August 2012) <<http://www.telegraph.co.uk/sport/football/teams/chelsea/9509960/Berezovsky-v-Abramovich-trial-Timeline.html>> accessed 22 December 2017.

² *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm).

³ Duncan Gardham, 'Berezovsky v Abramovich trial: How Boris Berezovsky lost a fortune' *The Telegraph* (31 August 2012) <<http://www.telegraph.co.uk/news/uknews/law-and-order/9509951/Berezovsky-v-Abramovich-trial-How-Boris-Berezovsky-lost-a-fortune.html>> accessed 22 December 2017.

The case, thus presented to the court, involved two Russian nationals disputing contractual relations connected only to Russia. Berezovsky claimed that his problems with the Russian authorities would make it difficult for him to organise a fair trial in that country. Whether this was true, however, was not taken into account by the court, given that Abramovich did not challenge its jurisdiction, which the court thus assumed. Given that no documents existed to support the claims of either party, the case was reduced to a point at which the court had to decide based only on the testimony of both men. The court considered that Berezovsky and his claim were not credible; hence, the final decision, rendered on 31 August 2012, was in favour of Abramovich.

The *Berezovsky v Abramovich* case established the record for the highest value in the history of courts in England. It became the most famous of the oligarch cases, but also the tip of an iceberg of oligarch cases being disputed in English courts.⁴ In 2012, Berezovsky settled out of court a case that was being heard by a court in London.⁵ This time, Berezovsky was litigating against the estate of his late associate Badri Patarkatsishvili. In 2012, Mikhail Cherney and Oleg Deripaska settled out of court a case worth £1 billion.⁶ In 2015, two other cases involving billions were presented in London courts. The first was between Victor Pinchuk, Ihor Kolomoyskyi, and Gennadiy Bogolyubov⁷ settled outside of court a case worth £2 billion. The second case, *BTA Bank v Mukhtar Ablyazov*, worth US\$4.4 billion was decided by an English court.⁸ This case in fact broke the English record for the number of lawyers involved: fifty in total.⁹

Cases like these are characterised by having limited or no connections with England, and they usually involve wealthy businessmen from the ex-Soviet Union. These businessmen have amassed their fortunes in ways that are unclear,

⁴ Adil Mohamedbhai, 'Why do Russian oligarchs love the English courts?' (The Lawyer, 19 October 2016) <<https://12b.thelawyer.com/why-do-russian-oligarchs-love-the-english-courts/>> accessed 22 December 2017.

⁵ Jane Croft, 'Berezovsky settles Patarkatsishvili lawsuit' *Financial Times* (London, 13 September 2012) <<https://www.ft.com/content/c3a60aee-c126-11e5-846f-79b0e3d20eaf?mhq5j=e3>> accessed 15 July 2017.

⁶ Luke Harding, 'Deripaska and Cherney make surprise deal out of court' *The Guardian* (27 September 2012) <<https://www.theguardian.com/world/2012/sep/27/deripaska-cherney-surprise-deal>> accessed 22 December 2017.

⁷ Owen Bowcott and Shaun Walker, 'Ukrainian oligarchs settle mine dispute worth billions out of court' *The Guardian* (22 January 2016) <<https://www.theguardian.com/world/2016/jan/22/ukrainian-oligarchs-settle-mine-dispute-worth-billions-out-of-court>> accessed 22 December 2017.

⁸ JSC BTA Bank v Ablyazov [2015] UKSC 64.

⁹ Khristina Narizhnaya, 'Russian oligarchs take over London courts' *Public Radio International* (17 February 2012) <<https://www.pri.org/stories/2012-02-17/russian-oligarchs-take-over-london-courts>> accessed 22 December 2017.

which has led to friction among themselves and between their governments. Nevertheless, despite the lack of connection, English courts have been consistent in assuming jurisdiction and resolving these disputes. In fact, 60% of the cases before the London Commercial Court involves Eastern European individuals with no connection to England.¹⁰ The examples above show that the financial interests involved in these cases are considerable. These litigations provide considerable revenue for English law firms, and have a substantial effect on the British economy.¹¹ It is no surprise that the Russian government is trying to counter this migration of cases.¹²

Cases of foreign litigants going to European courts to resolve their disputes have often been reported in the media. One of them involved BEG SpA and Enelpower SpA. In 2000, BEG SpA was contracted by the Albanian government to build a hydropower plant in Kalivaç. BEG SpA contracted Enelpower SpA to provide essential electromechanical equipment for the project. Before delivery of the equipment, however, Enelpower SpA asked for an additional €50 million over and above the already agreed price.¹³ BEG SpA refused, and initiated proceedings before an arbitral tribunal in Rome. The tribunal decided to dismiss the BEG SpA claim, a decision that was also upheld by the Italian Court of Cassation. However, BEG SpA started proceedings in Albania against Enelpower SpA via its Albanian subsidiary Albaniabeg Ambient shpk (ABA shpk). ABA shpk claimed non-commercial damages caused by Enelpower SpA in the Albanian courts. These

¹⁰ David Christie, 'Magnates for law: oligarchs in London' *The Law Society Gazette* (12 September 2012) <<https://www.lawgazette.co.uk/analysis/magnates-for-law-oligarchs-in-london/67280.article>> accessed 22 December 2017.

¹¹ Mike Giglio, 'Oligarch v. oligarch: London's courts attract litigious tycoons' *The Daily Beast* (23 July 2012) <<http://www.thedailybeast.com/oligarch-v-oligarch-londons-courts-attract-litigious-tycoons>> accessed 22 December 2017.

Rupert Neate, 'Top London law firms profit from feuding Russian oligarchs' *The Guardian* (4 September 2012) <<https://www.theguardian.com/law/2012/sep/04/london-abramovich-v-berezovsky-court-case>> accessed 22 December 2017.

¹² David Christie, 'Magnates for law: oligarchs in London' *The Law Society Gazette* (12 September 2012) <<https://www.lawgazette.co.uk/analysis/magnates-for-law-oligarchs-in-london/67280.article>> accessed 22 December 2017.

Khristina Narizhnaya, 'Russian oligarchs take over London courts' *Public Radio International* (17 February 2012) <<https://www.pri.org/stories/2012-02-17/russian-oligarchs-take-over-london-courts>> accessed 22 December 2017.

Gilles Cuniberti, 'Russian Move for Keeping Judicial Business at Home' (Conflict of Laws, 6 December 2012) <<http://conflictolaws.net/2012/russian-move-for-keeping-judicial-business-at-home/>> accessed 22 December 2017.

¹³ 'Enel: la Beg di Cerroni-Becchetti chiede 430mln dopo sentenza in Albania' *Corriere della Sera* (23 April 2012) <http://www.corriere.it/notizie-ultima-ora/Economia/Enel-Beg-Cerroni-Becchetti-chiede-430mln-sentenza-Albania/23-05-2012/1-A_001599062.shtml> accessed 22 December 2017.

claims were accepted by the first¹⁴ and second instance¹⁵ court in Albania, and a recourse by Enelpower SpA to the Supreme Court was not accepted. With a court decision worth over €400 million, ABA shpk initiated proceedings for the recognition and enforcement of the Albanian decision in France, Luxembourg, Ireland, the US, and the Netherlands. In the Netherlands, the final decision on this case was taken by the Supreme Court of the Netherlands on 23 June 2017, supporting BEG's claim.¹⁶

The *BEG vs. Enelpower* example shows that not only oligarchs tour Europe in search of litigation venues – other companies also do so, and probably wealthy individuals as well. Similar to the Grand Tours of the 17th century, modern litigants travel Europe in search of a place to litigate. Considering the sums involved, touring litigants should generate considerable business for lawyers and related services. Thus, it is no surprise that certain jurisdictions in Europe would be happy to have more cross-border litigants in their courts.

1.1.2 A research idea

Even before these cases, *the Lawyer*¹⁷ reported that the court of Düsseldorf in Germany held its first case in English. In fact, in January 2010 the Courts of Aachen, Bonn, and Cologne and the Cologne Appellate Court initiated a project to use English as a language for the submission of documents and to conduct hearings in international commercial cases. This was an attempt by German courts to be more attractive to international litigants, and it did not stop there. In November 2012, the Committee on Legal Affairs of the German Parliament discussed the draft bill to allow courts in Germany to use English during their proceedings.¹⁸ In fact, Germany's attempt to attract foreign litigants dates back to

¹⁴ Claimant 'ALBANIA BEG AMBIENT' shpk, and Respondent 'ENEL' spa and 'ENELPOWER' spa, Decision No. 2251, dated 24.03.2009 of the Tirana District Court.

¹⁵ Claimant 'ALBANIA BEG AMBIENT' shpk, and Respondent 'ENEL' spa and 'ENELPOWER' spa, Decision No. 789, dated 28.04.2010 of the Tirana Court of Appeals.

¹⁶ *Albaniabeg Ambient SH.P.K. v ENEL S.P.A. and Enelpower S.P.A.* [2017] Hoge Raad der Nederlanden ECLI:NL:HR:2017:1141 [23 June 2017].

¹⁷ Tom Philips, 'Open for business: the German Commercial Court, in English' (The Lawyer, 21 June 2010) <<http://www.thelawyer.com/open-for-business-the-german-commercial-court-in-english/1004799.article>> accessed 22 December 2017.

Miriam Lichstein and Oliver Seyd, 'English as an official language in German courts: lost in translation?' (International Law Office, 6 April 2010) <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=f8867ec1-f103-49b9-a2b6-aa6916974518>> accessed 22 December 2017.

¹⁸ Christoph A. Kern, 'English as a court language in continental courts' (2012) *Erasmus Law Review* 187, 199.

Currently, German courts are allowed to hear cases in English (or any other Language) if parties have agreed on this. A draft law proposing to create at regional level Chambers for International Commerce able to hear cases in English has been proposed for the second time

2008, when the brochure ‘Law Made in Germany’ was published.¹⁹ The brochure was part of an attempt by German legal associations and professionals to promote the use of German law in international commerce.²⁰ The brochure promoted the use of German courts as efficient, affordable, and professional. However, it appears to be a response to a similar English brochure titled ‘England and Wales: the jurisdictions of choice’ published by the Law Society with the support of the British government.²¹ The Law Society aimed at attracting foreign litigants to London or other courts in Britain. Moved by the same goals, France inaugurated a new international division in the Paris Commercial Court, which would be able to assess evidence in English, German, and Spanish. However, remaining procedural steps would be held in French. This division aimed at becoming more attractive to international litigants, and, also, at responding – though not openly – to the competitive pressure from other jurisdictions.²²

It came to the attention of journalists that during the oligarch cases some EU jurisdictions were competing to attract litigants.²³ These attempts to attract litigants seem to have increased with the progress of the Brexit negotiations. Clearly, some Member States are trying to capitalise from the potential migration of litigants from London to other EU jurisdictions. The Netherlands, for example, has an advanced project to create a specialised court, which will deal with international commercial cases. Belgium is following similar steps, which aim at

to the Bundestag by the Bundesrat. The draft is still with the Bundestag. Barbara Mayer, ‘English courts abroad—Germany waits to move forward’ (LexisNexis Dispute Resolution, 13 January 2017) <<http://blogs.lexisnexis.co.uk/dr/english-courts-abroad-germany-waits-to-move-forward/>> accessed 22 December 2017.

¹⁹ The brochure has reached its third edition and can be downloaded from the website <<http://www.lawmadeingermany.de>> accessed 22 December 2017.

²⁰ Galf-Peter Calliess and Hermann B. Hoffmann, ‘Judicial Services for Global Commerce – Made in Germany?’ (2009) *German Law Journal* 115, 117.

²¹ The brochure can be downloaded from the website of Eversheds, one of the law firms supporting its development <<http://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf>> accessed 22 December 2017.

²² Gilles Cuniberti, ‘Paris, the Jurisdiction of Choice?’ (Conflict of Laws, 2 February 2011) <<http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/>> accessed 27 September 2017.

²³ David Christie, ‘Magnates for law: oligarchs in London’ *The Law Society Gazette* (12 September 2012) <<https://www.lawgazette.co.uk/analysis/magnates-for-law-oligarchs-in-london/67280.article>> accessed 22 December 2017.

Mike Giglio, ‘Oligarch v. oligarch: London’s courts attract litigious tycoons’ *The Daily Beast* (23 July 2012) <<http://www.thedailybeast.com/oligarch-v-oligarch-londons-courts-attract-litigious-tycoons>> accessed 22 December 2017.

Gilles Cuniberti, ‘Russian Move for Keeping Judicial Business at Home’ (Conflict of Laws, 6 December 2012) <<http://conflictoflaws.net/2012/russian-move-for-keeping-judicial-business-at-home/>> accessed 22 December 2017.

creating an International Business Court in Brussels.²⁴ In Germany, as well, the voices that shout out the lucrative possibilities of Brexit in the competition for litigations are increasing. The Frankfurt Initiative (supported by the Federal State of Hessen) calls for a promotion of Frankfurt as a litigation hub, where litigants can go when migrating from London.²⁵

It is clear that competition involves not only litigants that choose a court but also lawyers, and not only governments but also courts, and, in addition to this, also the EU. It is therefore reasonable to assume that competitive activities have the potential to affect not only laws and institutions of the countries involved but also regulations and institutions of the EU. Furthermore, changing the laws and institutions has repercussions on society and on the economy. The relation between governments, courts, cross-border litigants, laws, and economy appears to be intertwined. And this intertwining of factors – combined with its relevance for governments, lawyers, and litigants, as well as the effects it has on law and procedures – is the primary inspiration for the present research. This introduction continues with an analysis of the meaning of jurisdictional competition and the competition of civil justice systems. The other sections in this chapter define the research question, the scope and focus of this research, and the steps taken in conducting it.

1.2 Defining the competition of civil justice systems

1.2.1 Competition of jurisdictions

As mentioned above, it is common to find governments competing in different fields of law. Some examples include competition in tax, labour, company, and environmental law. These forms of competition are commonly called *competition of jurisdictions* or *regulatory competition*. While there is no agreed definition of these ‘competitions of jurisdictions’, some characteristics are common to all of them, and are expected to be present in other forms of competition as well. A first characteristic is the existence of a law or group of laws offered to mobile users of legislation. A specific law or a group of laws is the focal point of the competition of jurisdictions. It is the law that a jurisdiction offers and that is chosen and applied by legislation users. In this regard, the law also includes the institutions that are created and organised based on a specific law. Specific institutions, like courts,

²⁴ Ministry of Justice of Belgium, ‘Création Brussels International Business Court’ (Press release, 27 October 2017) <<https://www.koengeens.be/news/2017/10/27/creation-brussels-international-business-court>> accessed 22 December 2017.

²⁵ Matthias Weller, ‘The Justice Initiative Frankfurt am Main’ (Conflict of Laws, 31 March 2017) <<http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>> accessed 22 December 2017.

are sometimes the reason that legislation consumers choose a particular jurisdiction. Competition, therefore, can also be expected to unfold as modalities of organising the institutions of a jurisdiction, improving their performance and outlook. A second characteristic is the existence of two or more jurisdictions that prepare, maintain, and promote the laws requested by the consumer. Competition implies the existence of more than one jurisdiction that tries to attract consumers. However, as will be argued in Chapter 2, competition can still exist even if only one jurisdiction is actively offering its law to cross-border users. Nonetheless, the number of jurisdictions that offer their law to foreign users is important in determining the intensity and the development of competition itself. A third characteristic is the existence of mobile consumers that choose the laws of one of the competing jurisdictions in order to further their business. Given that many laws limit their territorial scope within the borders of one jurisdiction, mobility is an expected characteristic of these consumers. It is therefore important for many of them to relocate to the territory of a jurisdiction in order to benefit from its law. Apart from being mobile, legislation consumers should be able to choose from among the laws of different jurisdictions. It is this choice that highlights consumers' preferences.

Considering the characteristics distilled above, the competition of jurisdictions can be defined as a process where two or more jurisdictions offer and promote the use of their laws to mobile legislation consumers who choose these laws to further their business. The competition of civil justice systems is a type of competition of jurisdictions, whose court systems are offered to cross-border litigants.

1.2.2 Different terms used for the civil justice system competition

The legal literature uses different terms when it comes to the competition between jurisdictions to attract litigants. Three of the most common terms are 'court competition', 'dispute resolution competition', and 'civil justice system competition'.²⁶ It appears that scholars do not distinguish between the terms, but, even though they are each technically correct, only 'civil justice system competition' seems to better describe the competitive activities of jurisdictions.

Civil justice system competition implies the existence of two or more jurisdictions that offer their judicial system to cross-border litigants. At the same time, cross-border litigants choose the court of one of these jurisdictions. However, courts are part of an ecosystem, which is the civil justice system, in turn composed of all the institutions, laws, and procedures that facilitate the resolution of a dispute by courts. For example, the litigation culture, the reputation of the court, the quality

²⁶ Although 'competition of judicial markets' and 'competition between national procedural systems' are also used.

of the lawyers, the litigation procedure, and the enforcement possibilities are all part of a jurisdiction's civil justice system. Therefore, when litigants make a choice of court they choose not only the jurisdiction's court but the whole ecosystem that supports and facilitates the court's functioning. Considering these factors, the competition of civil justice systems as described in this dissertation denotes all the activities aimed at attracting litigants to the courts of a jurisdiction, and all the activities of litigants in choosing a court in which to litigate. The other terms are not necessarily wrong, but they fail to include all the elements entailed by the civil justice system competition.

Court competition suggests, *sensu stricto*, a competition between courts, where some jurisdictions or some courts are offered to litigants. The term, however, omits the existence of a cross-border element, as it can also refer to a competition between the courts of a jurisdiction. *Sensu lato* 'court competition' would imply the competition of the whole judicial system of a jurisdiction, and also the existence of a cross-border element. 'Dispute resolution competition' hints at a competition not only between courts but also between other mechanisms that resolve disputes, like arbitration and mediation. While competition between these mechanisms exists, 'dispute resolution competition' is often used to describe the civil justice system competition. Furthermore, dispute resolution competition does not show the cross-border element of the process. Regardless of the term, however, it is important to emphasise that the civil justice system competition should include cross-border choice makers as well as the whole justice system dedicated to the resolution of disputes.

1.2.3 Assumptions on the competition of jurisdictions

Scholars studying the competition of jurisdictions make assumptions that will help in their research, and that are often accepted as true without further discussion. However, critics point out that some of these assumptions are questionable. Hence, the vulnerability of the studies are also dependent on the vulnerability of the assumptions. Given that the present study makes implicit and explicit use of some of these assumptions, it is a good idea not only to present some of the ones used but also to critically assess their validity as well as their use and implications. The set of assessments identified here is based on the work of Alpa (2004)²⁷ and Swire (1996).²⁸ This list is neither exhaustive nor compiled in any particular order of importance. Clearly, some assumptions are used more than others, while others are specific to particular aspects of the research.

²⁷ Alpa (2004) 43.

²⁸ Swire (1996) 67.

Jurisdictions seen as people. This assumption considers jurisdictions to be similar to people, having a body and a spirit that is controlled by a single central unit. As a consequence, competing jurisdictions rush to prevail over other jurisdictions in the same way competing athletes do. This race is undertaken in a fully conscious manner and by using all the physical and mental resources of that jurisdiction. However, the assumption oversimplifies the similarities between people and complex organisations like states. In fact, states have complicated decision-making mechanisms, with a division of power and decentralisation that results in them having multiple decision-making centres.²⁹ Furthermore, in the competition of legal systems, not all of a country's resources are dedicated to that competition – not even a percentage compared to those applied by an athlete in a competitive race.

Legal orders seen as geometric constructions fixed in time. This assumption considers jurisdictions to have a clear scheme of regulations, possibly arranged in the shape of a pyramid. This structure is monolithic and fixed in time, and therefore provides a systematic vision of a country's whole legislative body. However, this static approach does not take into account that regulations change over time, and often with considerable frequency. Furthermore, the pyramid shape or any other geometrical figure cannot be used to represent the exact form of the legal organisation. Hence, simplifying a jurisdiction's legislative structure poses the risk of making regulatory competition easier than it is.

Regulations and legal orders seen as items on supermarket shelves. This assumption gives a simplistic view of the regulations and legal orders in general. On the one hand, they are considered as attempts to be more appealing and more fashionable so that potential clients will select them. On the other hand, clients can choose freely from among a seemingly endless number of regulations or jurisdictions. In reality, the 'appeal' or 'fashion' is not the prime concern of law makers or governments, and at the same time, clients are not completely free to choose between regulations in the way that they are free to choose items in a supermarket. Choice of law or choice of court is not as simple as taking apples from a supermarket shelf.

Legal orders seen as pure and untouched by foreign interference. This assumption considers legal orders to be isolated, and therefore having their own individual evolution. In other words, jurisdictions are sterile; hence, in the case of the German jurisdiction, its legal solutions are endemic, and cannot be found in other jurisdictions. In contrast, this assumption does not take into account that jurisdictions study each other for inspiration and solutions to common problems.

²⁹ This is discussed further in Section 4.4.

This means that their regulations influence and borrow from each other, resulting in a relationship involving constant exchange and offering cases of remarkable similarity. The harmonisation process in the EU and the role of EU legislation have further integrated the legislation of Member States. Although differences exist between Member States, they do not define the whole system.

Legal orders seen as denoting the identity of a nation. The legal order and the regulations of a nation are part of its cultural identity, but they are not the only cultural identification element. In the study of the competition of jurisdictions, this assumption reduces the national identity to the legal culture. This eliminates the possibility of seeing a broader picture in which a nation's cultural elements add to the legal culture and, indirectly, to the competitive capability of a jurisdiction.

Competition of jurisdictions merged with the competition of nations or firms or products. This assumption considers that the winner of the race would be the jurisdiction with the strongest political power, or the one that displays the best qualities or manifests the most evolved or refined culture. According to Alpa, these measurements are established arbitrarily by the observer.³⁰ In reality, however, history has many examples of judicial systems living not in competition but in harmony. Each of these systems bears appreciable or depreciable values based on the observer's point of view. It is this perspective and the standards applied by the observer that make a jurisdiction a winner or a loser. Accepting these aspects of the problems related to the choice of standards in evaluating the winner of a race, Alpa does not touch upon the competition of nations in general. In this regard, it should be said that the competition between jurisdictions cannot exist independently of the general attempts of a nation to increase its competitiveness. Furthermore, having a competitive legislation would increase the image of the country as competitive³¹ in general. In this view, competitions are organically related to each other.

Competition is seen as a positive process and the others as negative. In general, competition is considered a positive process.³² Other processes like harmonisation, approximation, convergence, common core, uniformity, or homologation are considered to be negative. Without arguing how true this is, it

³⁰ Alpa (2004) 47.

³¹ Alpa has a good point in considering that the standards used to evaluate a successful competitive race are relative. In this perspective, a country might choose to improve its human rights legislation and be competitive in this respect. Another country might choose to change its tax legislation and be competitive in this regard. Each would think the other odd and non-competitive, simply because of the different standards they apply.

³² Benefits derived from regulatory competition are discussed further in Sections 2.1.

can be said that competition and the other processes do not exclude each other. They are not on opposite sides of the same coin. In some cases, harmonisation can facilitate competition and *vice versa*. Therefore, competition cannot have an absolute positive value while the others are stigmatised as being negative.

Competition is seen as positive because it respects diversity. The fact that competition can work only because of the plurality of regulations and legal orders does not mean that competition respects them. In fact, it is because of competition that many legal norms do not survive, and fall into disuse. Therefore, competition disrupts, and has a tendency to shrink diversity.

Governments are assumed to know the consequences of their competitive behaviour. It is considered that governments have a clear knowledge of the consequences of their actions. They know how the economy will respond, and how their society will be affected. However, it is clear that governments have limited abilities to predict the impact of competitive behaviour on society.

States are assumed to represent the will of their population. Representative democracies are considered to represent the will of a large segment of the population. This remains true when governments decide to enter into competition with another jurisdiction. While the assumption is true and in line with the general conception of representative democracy, it can pose problems with regard to studying competition. Where environmental law, tax law, or employment law are concerned, the competition of jurisdictions might have severe consequences for the population. It should come as no surprise if the government were to take a decision that is supported by the minority rather than the majority of voters.

1.3 Research question

1.3.1 Central research question

Many elements and actors are involved in the competition of civil justice systems. The above-mentioned examples illustrate that attempts to compete for foreign litigants involves governments, law makers, laws and regulations, courts, judges, lawyers and their associations, and businesses. The abundance of these elements and actors in the EU seems to create the ideal conditions for the competition to develop. Nevertheless, while the examples seem to affirm this, competition in the EU needs further study. The aim of this research is to systematically study the elements and actors, using theoretical and empirical analysis as well as insights from other disciplines. On a practical level, the aim of the research is to bring the benefits of competition to the attention of governments, and to bring to lawyers a better view of this process. To realise these goals, the research aims to answer this question: **How do civil justice systems compete in the European Union?**

1.3.2 Perspectives and supporting research questions

This research considers two perspectives, the *first* of which requires the identification and the analysis of **elements** and **actors**. A preliminary assessment identifies three group of **actors**: one that creates the demand for cross-border litigation, one that supplies the civil justice system, and one that consists of interested parties. The group creating the demand for cross-border litigation is composed of mobile businesses or individuals, lawyers, and related associations like chambers of advocates or chambers of commerce. The supply side is composed of governments, courts, judges, and other institutions that provide support in supplying the civil justice system. Interested parties are those that are not directly involved in the demand for or in the supply of cross-border litigation, but are affected by the competition that develops. These parties include the EU, individuals, and the public in general. Some **elements** identified by a preliminary assessment include EU law, local law, justice quality, harmonisation, and rights of parties involved in or affected by competition. To support the central research question and to better examine the elements and actors, the following sub-questions must be answered: What is the role of the EU in the civil justice system competition? (Chapters 3 and 5); Who composes the demand side? What roles do litigants and lawyers have? How do they relate to each other? (Chapter 4); What roles do governments and courts have? (Chapters 4 and 5); How are individuals affected by competition? How is the general public affected by competition? (Chapters 2 and 4).

The first perspective is more introspective, seeking to understand the internal elements and actors in the competition. The *second* perspective considers the relation and the influences of competition on processes like harmonisation, reform of the judiciary, and so on. Some questions considered from this perspective are: What happens to the quality of law during competition? (Chapter 2); How do competition and harmonisation relate to each other? What effect does EU law have on competition? (Chapter 3); How does competition affect the protection of weaker parties in the EU? (Chapters 3 and 4); How does competition affect access to courts? How does competition affect national procedural law? (Chapter 4).

These combined perspectives provide an answer to the central research question. It should be pointed out that these perspectives are often combined because the elements and actors are intertwined with the process in which they are involved. The questions listed for each perspective do not exhaust the pool of questions that can arise from the study of the civil justice system competition. However, they are limited by the scope and the focus of this research.

1.4 Scope and relevance

1.4.1 Scope

This research limits the study of the competitive activities from Member States or cross-border litigants to the period between 2007 and 2017. Legislation, case law, and the literature before 2007 is considered without prejudice. The year 2007 is significant because it marked the launch of the brochure ‘England and Wales: the jurisdictions of choice’ by the Law Society of England and Wales, which initiated a ‘brochure war’ between England, Germany, and France, and that continued for several years.³³ The brochure war was followed by competitive steps to attract cross-border litigants, and they continue to this day with no sign of slowing down.

As is clear from the central research question, this study is focused on the civil justice system competition in the European Union, although examples and studies from the US are referred to below. Studying the EU is interesting in several respects. First, it already shows signs of competition from between several jurisdictions, and as mentioned there is no indication that competition will slow down. Second, competition in the EU is based not only on a series of EU regulations that facilitate the cross-border movements of litigants, but also on the recognition and enforcement of decisions. These regulations allow a great deal of party autonomy, and therefore create the best conditions for the development of regulatory competition. Third, the EU has twenty-eight diverse legal systems, which provides a plurality of choice to mobile cross-border litigants with a plurality of choice, and as a consequence helps competition to thrive. Fourth, Brexit will change the competition landscape considerably in EU. England as the most attractive jurisdiction will lose the benefits of being in the EU, and which will lead to some litigants considering other alternative jurisdictions to litigate. Because of this, civil justice system competition in the EU has a considerable potential to intensify, with Member States competing to replace England as the leading competitor. Fifth, competition is economically significant. Competing Member States extract direct and indirect benefits from cross-border litigants. Direct benefits consists of revenues from court fees, while indirect benefits are those derived from the taxation of litigants or their lawyers. Lawyers are, also, beneficiaries benefit from competition. An attractive jurisdiction provides a heftier workload to lawyers, and potentially increases their revenues. Sixth, the harmonisation of civil procedural rules is an ongoing process in the EU, and although competition benefits from legal diversity, harmonisation does not favour

³³ Vogenauer (2013) 227, 231.

it. The interaction between harmonisation and competition is an interesting aspect of the EU.

The most important regulations for the civil justice system competition are the Brussels I (recast) Regulation and the Rome I and Rome II Regulations. Their scope involves civil and commercial cases, which also determine the substantive extent of this research. Cross-border civil and commercial cases involving international companies engaged in high-value disputes are also lucrative, and are expected to attract the attention of governments as well as lawyers. Furthermore, cross-border commercial disputes are also important for the EU, which is interested in facilitating a healthy judicial environment that would benefit investments. Among others, this means clear rules on the recognition and enforcement of judgments, and the protection of party autonomy.

Competing Member States face competition not only from each other but also from other dispute resolution mechanisms. These include arbitration and mediation, which offer reliable and familiar instruments for solving disputes. A competition between courts, arbitration tribunals, and mediation institutions is therefore very important for businesses and Member States. However, the competition between different dispute resolution mechanisms is beyond the scope of this research, which is focused only on the competition of civil justice systems, with courts being the central point. This choice was made because competing Member States address the competition between each other more frequently than the competition with alternative dispute resolution mechanisms. In addition, their competitive activity is directed more towards attracting court litigants, rather than parties that would go for an alternative dispute resolution mechanism. Arbitration and mediation, as the brochure war showed, are often mentioned as good practices and inspiration to offer innovative court services, and only incidentally are mentioned as competitors in government policy documents. Moreover, the competition of courts within the same jurisdiction is also excluded. Without prejudice to the role of arbitration and mediation, courts are important in the protection of the rights of weaker parties and in the guarantee of social peace. Furthermore, the research is limited to the competition for civil and commercial cases. This limitation is set by the same regulations that allow litigant mobility, but – as the research demonstrates – civil and commercial cases are also the most lucrative for competing jurisdictions and other interested parties.

1.4.2 Relevance of the research

The freezing of academic discourse on the civil justice system competition seems to have coincided with the end of the brochure war. While competition for litigants is often mentioned, dedicated research is rare. At the same time, to attract litigants nowadays, competing Member States bypass the brochure war and

compete by changing laws and procedures or the institutional framework. This research contends that the time is right to discuss the civil justice system competition more fully, and to instigate further academic debate by engaging in a theoretical and empirical study.

From a practical perspective, this study is important to the EU, to competing governments, and to cross-border litigants and their lawyers. The EU is as proud of its diversity as it is willing to harmonise the legislation of its Member States. However, because harmonisation and competition are not highly compatible, and are an ongoing source of debate, this research contributes in the form of an analysis of the discussion. Furthermore, the analysis provides insights into the role of the EU in regulating the judicial system across Europe. The EU's position as a regulator as well as a policy maker should take into account the role of the civil justice system competition for Member States and the internal market.³⁴ Hence, theoretical research combined with empirical data is a valuable contribution.

This study is relevant to the governments involved in competition, as it provides an analysis of the benefits and of the impact on laws and institutions, and an empirical analysis of choice of court in Europe. Recent developments show that governments' interest in attracting international litigants is increasing. With Brexit approaching, more opportunities have sprung up on the horizon of countries in continental Europe. Amsterdam, Frankfurt, and Brussels seem to be preparing for a migration of litigants from London. The Netherlands, in this respect, has been preparing for a relatively long time.³⁵ The project for the Netherlands Commercial Court is well advanced, and in 2018 the Court is expected to open its doors.³⁶ Germany is not as advanced as the Netherlands, but the Frankfurt Initiative shows the existence of numerous interests groups that

³⁴ Hess (2016) 12-14; Burkhard Hess, *Harmonized Rules and Minimum Standards in the European Law of Civil Procedure* (In-depth analysis for the European Parliament's Committee on Legal Affairs, PE 556.971, 2016) 12 <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA\(2016\)556971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA(2016)556971_EN.pdf)> accessed 22 December 2017.

³⁵ Marta Requejo Isidro, 'Brexit – Immediate Consequences on the London Judicial Market' (Conflict of Laws, 24 June 2016) <<http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/>> accessed 22 December 2017. Dutch lawyers also seem optimistic, see Sarah Beeston, 'Brexit: a further boost to the popularity of the Dutch courts for cartel damages claims?' (Van Doorne, 6 March 2017) <https://www.vandoorne.com/globalassets/publicaties/2017/brexit_dakota_sarah.pdf> accessed 22 December 2017.

³⁶ It is expected that the court will open its doors in the second half of 2018. Updated information is published at: <<https://www.rechtspraak.nl/English/NCC>> accessed 22 December 2017.

lobby for the creation of an attractive court for international commercial cases.³⁷ A newcomer in the competition scene is Belgium, which declared its intention to create the Brussels International Business Court as an alternative litigation venue after Brexit.³⁸ The Belgian proposal seems to offer a court with arbitration elements, which aims at answering the needs of business litigation. These examples show the importance of the current study, not only on an academic level, but also on a practical level. Competing governments can use these results to adjust their competitive activities as well as to improve their understanding of the competition. For governments that do not already compete, this study can be an inspiration to begin, and to consider the best strategy.

Companies and individuals that engage in cross-border business are among the stakeholders that could make good use of this study. Through it they could better assess which Member State has policies that welcome foreign litigants, which Member State has the best judicial system, and how do parties choose a court. However, it is the lawyers as a professional and as a lobbying group that would benefit most. As professionals, lawyers would see the general trend regarding choice of court in the EU, as well as how their choice of court strategy compares to that of other lawyers, and how they might improve it. As a lobby group, lawyers could use the study's results to advocate with their governments regarding more involvement in the competition and better strategies to benefit from that involvement.

1.5 Approach to the research

1.5.1 Literature review of the most important studies

Before the start of this research project, it was clear that the literature on the competition of civil justice systems in the EU was limited. Vogenauer (2013a)³⁹ and Wagner (2014)⁴⁰ were among the first to conduct studies of this kind in EU, and they were included in a book edited by Eidenmüller (2013),⁴¹ which also

³⁷ Matthias Weller, 'The Justice Initiative Frankfurt am Main 2017' (Conflict of Laws, 31 March 2017) <<http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>> accessed 22 December 2017.

³⁸ Ministry of Justice of Belgium, 'Création Brussels International Business Court' (Press release, 27 October 2017) <<https://www.koengeens.be/news/2017/10/27/creation-brussels-international-business-court>> accessed 22 December 2017; Maxime Colle and Carlo Persyn, 'An International Business Court in Brussels: a Modern Step Forward' (Lexology, 2 November 2017) <<https://www.lexology.com/library/detail.aspx?g=f101059a-3678-4797-8ee0-54c7a0487fc2>> accessed 22 December 2017.

³⁹ Vogenauer (2013a).

⁴⁰ Wagner (2014).

⁴¹ Eidenmüller (2013).

contained other contributions related to the topic of this research. In his paper, Vogenauer analysed several empirical studies (including one he conducted himself in 2009), and concluded that no competition of jurisdictions existed between civil justice systems in Europe. Wagner's paper offered a theoretical analysis of the competition for adjudication. He analysed the demand for court adjudication, proposing the idea of Chapter and bilateral competition. Without aiming at a complete review of the literature, it is worth mentioning a paper by Landes and Posner (1979),⁴² in which the authors describe the nature of court decisions as goods. This study shows that court decisions comprise a bundled good, and each good in the bundle has different characteristics. Another group of studies has made a major contribution to this research from the empirical perspective. As previously mentioned, a survey conducted by Vogenauer in 2009 indicated that England and Switzerland were the most preferred court jurisdictions in Europe. Another survey on businesses was conducted by the *Haute Ecole Commerciale Paris*,⁴³ and concluded that psychological factors play an important role during the choice of law and procedural law. Keeping in mind this basic body of knowledge, the present research was organised from a theoretical and an empirical perspective, which is explained in the steps below.

1.5.2 Methodology

It was clear from the literature review at the beginning of this research that regulatory competition is dynamic and changing rapidly. It was also clear that theoretical and empirical studies on the civil justice system competition in the EU are limited, although regulatory competition studies are more frequent in the US. However, using these studies in the EU context seems difficult because of differences in the legal systems and in the development of competition in other fields of law. Based on these premises, the present study considers a combination of doctrinal research, desk research and empirical methods to be the best methodology to tackle its core question.

Doctrinal research sets about studying primary as well as secondary sources, which include legislation, reports and policy documents, and case law. The most important regulations for the civil justice system competition are the Brussels I (recast) Regulation and the Rome I and Rome II Regulations. The analysis of these regulations aims at defining the legal framework within which competition develops, and in particular the instruments that allow parties a choice of court. Establishing a legal framework also facilitates the study of behaviour on the part of competitors and the EU as a third party. The EU, which creates and maintains the legal framework, is interested in consolidating the internal market and

⁴² Landes and Posner (1979).

⁴³ Durand-Barthez (2012).

improving judicial systems throughout its Member States. EU policies and responses can be better considered through a critical analysis of reports and policy documents related to the civil justice system competition. The EU's official websites are used to search for such documents, and the snowballing approach starting with the EU Judicial Scoreboard is examined, as well as documents mentioned in the scholarly literature. The analysis of these documents is divided between Chapters 3 and 5. Secondary sources consist of legal studies as well as those from other disciplines. Sections on the psychology of choice rely on studies conducted by psychologists and sociologists, while other sections rely on the work of economists. This interdisciplinary contribution provides depth to an analysis that takes into account how the civil justice system competition is connected with other disciplines.

The empirical research is divided into three parts, the first of which is a study of the data reported in the EU Civil Justice Scoreboard. Section 5.1 provides a detailed methodology regarding this part of the research. The second part consists of research into the economic significance of the legal business in four competing Member States (England, Germany, France, and the Netherlands), in addition to two potentially very competitive Member States (Denmark and Luxembourg). This part uses the Member States' national statistics to collect data in order to compare the relevance of the legal industry for the local economy. The third part is a survey regarding lawyers' choice of court preferences in the EU. For this, a questionnaire was distributed among lawyers working at the top law firms in the EU. In addition to collecting data on lawyers' preferences, the questionnaire's purpose was to provide data regarding predictions made in the theoretical analysis. Section 5.3 provides a detailed analysis of the methodology used for the survey.

1.5.3 Sixteen steps taken to conclude the research

Step 1 was to assess the benefits of competition in general and the regulatory competition in particular. Research from the US was extensive on this topic, and applicable to the EU situation with only minor adjustments. Assessing the benefits and importance of competition also exposed the importance of certain theories related to the competition of jurisdictions. Among the most important are the Tiebout theory and the heterodox and orthodox conceptions of competition, all of which help to explain the importance of the civil justice system competition. Step 2 was to analyse research on the competition of jurisdictions in company, tax, labour, contract, and environmental law. These fields of law were chosen because of the relative abundance of related research. Some of the conclusions are applicable to the civil justice system competition because the modality in which competition unfolds in all the cases is similar, and the parties are mostly the same. Nevertheless, these conclusions are re-examined in the other steps. Step 3 was to

evaluate the race-to-the-bottom hypothesis. Race-to-the-bottom is considered to affect the law of competing jurisdictions, and is one of the negative outcomes of competition. This step discusses findings from other studies, and examines them within the framework of the civil justice system competition. Step 4 was to make a link between psychological studies on choice and the choice process in law. The ability to choose is crucial for the competition of jurisdictions, but few studies have paid attention to the psychological implications of choice making. This step was based mainly on the work of Schwartz (2000, 2002, 2004) and Salecl (2009, 2010, 2012), who are renowned psychologists. The former has a well-established reputation in the psychology of choice, and the latter is a well-known researcher in cognitive sciences. Step 5 was a proposal to create a formula for assessing the intensity of the competition. This step is a response to the debate between scholars that either deny or accept the existence of competition (regardless of the field). It is suggested that this debate can be settled if parties calculate the intensity of competition by using predefined requirements. This method can also be used to better describe the civil justice system competition in the EU.

Step 6 is an analysis of the legal framework that facilitates the competition, and it covers mostly the Brussels I (recast) Regulation and the Rome I and Rome II Regulations. Step 7 examines the relation between harmonisation and the civil justice system competition: first, it compares the modalities that harmonisation is actuated, and how these modalities interact with competition; and second, it proposes possible future scenarios for both harmonisation and competition.

Civil justice system competition unfolds in a market, and is composed of a good, a supply side, and a demand side. Step 8 was an analysis of the market; it builds on current studies on judicial markets, and analyses the structure and characteristics of the civil justice system market. Steps 9, 10, and 11 analyse the good in the market, the supply side, and the demand side. These steps relied on existing literature on the concept of good, on the lawyers market, and on analyses carried out in the previous steps. Step 9 is important for showing that the good in the civil justice system market is compound. This conclusion is used in constructing the reasoning on the development of the civil justice system competition. Step 11 is significant in demonstrating the dominant position that lawyers have in the lawyer-client relationship. This role is important in terms of lawyers being the most important target population for the survey in step fourteen. Step 11 examines the outcomes in a unilateral and bilateral form of choice of court.

Step 12 is important in analysing on an empirical basis the supply side of the civil justice system competition in the EU, using the results of the 2016 EU Justice Scoreboard. Section 5.1 provides more details on the methodology. Step 13

assesses the competitive activities of Germany, France, England and Wales, and the Netherlands as competing Member States, plus Denmark and Luxembourg as the best-scoring jurisdictions from step twelve. Step 13 uses data from the statistical institutes of each country to assess the importance of the legal market for its economy. Step 14 is an empirical study consisting of a survey distributed among lawyers in the EU. The survey's methodology and organisation is explained further in Section 5.3.

Step 15 culminates in the conclusions contained in Chapter 6, which collects material from the above-mentioned steps, and answers the central research question as well as sub-questions.

1.6 Outline

The work is aimed at answering the central research question, and is divided as follows in accordance with the steps described above.

Chapter 2 provides an overview on the competition of jurisdictions. The aim of this chapter is to analyse certain issues common to the different types of regulatory competition. This analysis will be used further in the other chapters to explain aspects of the civil justice system competition. The importance and the benefits of regulatory competitions are analysed in Section 2.1. The analysis in this section relies mostly on economic viewpoints on competition, some of which consider that competition increases knowledge and creates order. Examples from competition in other fields of law are analysed in Section 2.3 with regard to the implications of competition for civil justice systems. One of these implications is the impact that regulatory competition has on the quality of law. Section 2.4 considers whether the quality of law deteriorates during competition, and, if it does, how it can be stopped. However – although competition is possible thanks to people's ability to choose – owing to psychological and social hurdles, it is not easy to make a choice (Section 2.5). There is considerable academic debate on competition regarding the existence – or not – of competition of jurisdictions in a particular field of law. Section 2.6 contributes to this debate in the form of a method to measure the intensity of the competition.

Chapter 3 provides an overview of the legal framework that facilitates the civil justice system competition in the EU. Section 3.1 is dedicated to the Brussels I (recast) Regulation and Section 3.2 to the Rome I and Rome II Regulations, with the purpose of demonstrating the tremendous potential that EU legislation offers to the development of competition. Competition, however, can be disrupted by the harmonisation process that is currently underway. Section 3.3 analyses the

relation between competition and harmonisation, and whether a coexistence of the two is possible.

Chapter 4 contains a theoretical analysis of the civil justice system competition in the EU, and its aim is to dissect and theoretically analyse all of its components. In this context, Section 4.1 analyses the market for civil justice systems, in particular its organisation and characteristics, as well as its incentives for litigating parties. The good in the market, the demand side, and the supply side of the market are analysed in Sections 4.2, 4.3, and 4.4. Competition of jurisdictions can unfold in two ways, depending on who makes the choice from the demand side. These situations have different consequences for both the demand and the supply side (Section 4.5). If the choice of court is made by only one party (usually the claimant), competition is considered unilateral; if the choice is made by two parties, competition is considered bilateral.

Chapter 5 contains an empirical analysis of the civil justice system competition in the EU, with Section 5.1 examining the results of the 2016 EU Judicial Scoreboard. The aim of this section is to assess which jurisdiction in the EU is the best according to the Scoreboard, how competing Member States perform, and whether the best-scoring Member States are the ones most frequently chosen by lawyers. Lawyers' choice preferences and the results from the survey conducted for this research are analysed in Section 5.3. Section 5.2 examines the competitive activities of England, France, Germany, the Netherlands, Luxembourg, and Denmark. The aim of Section 5.2 is to clarify what competitive activity each Member State conducts, and its benefits – or potential benefits.

Chapter 6 presents the conclusions, which follow the structure of the research: namely, summarising the main findings of the various sections, and providing an overview of how the competition between civil justice systems unfolds in the EU. This also fulfils the study's overall goal.

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Chapter 2 Competition, regulatory competition, and choice-making

Jurisdictions compete with each other in various ways. Among others, they employ changes in legislation in order to attract investors in general or a particular business niche. Examples of competition between jurisdictions are found, for instance, in company, tax, and labour law. In addition, the further globalisation of the economy has facilitated cross-border exchange as well as civil commercial conflicts, which involve considerable economic interests. Some countries seem to compete to attract these interests, which gives rise to the civil justice system competition, in which jurisdictions seek to entice litigants to resolve conflicts in their courts.

However, the competition of jurisdictions has broad implications. This chapter introduces, discusses, and analyses some of the most important topics in this regard. As mentioned in Section 1.2.3 of the Introduction, competition is assumed to be a positive process. While this assumption is maintained throughout the research – with some explicit exceptions – this chapter goes beyond it, and explores certain derivative benefits. Although benefits of and incentives for the civil justice system competition are analysed in Chapter 4, the present chapter adopts a broader approach. Furthermore, it discusses research findings from regulatory competition in other fields of law with the intention of providing an outline of the development, problems, and benefits of the competition in these fields, and of exploring the possibility of transposing some of these findings to the civil justice system competition. Another aim of this chapter is to create a bridge between the study of the civil justice system competition and the studies on the psychology of choice. This interdisciplinary approach becomes necessary, given that competition depends on choice, and choice is a process affected by psychological factors.

This chapter begins with a critical evaluation of some theories on regulatory competition, which along with competition in company, tax, and labour law, and in some other fields is discussed in Section 2.3. Section 2.4 provides an analysis of the consequences of regulatory competition on the quality of law. Regulatory competition is possible if individuals and companies are able choose between different jurisdictions. However, choosing is a complicated process, with part of the difficulty in the form of certain psychological hurdles often recognised in legal research. For this reason, Section 2.5 provides an overview of a selection of psychological studies on choice making. In concluding, this chapter proposes a

method of measuring the intensity of regulatory competition, and is geared towards a better understanding of how competition unfolds and what the consequences might be for both the demand and the supply side.

2.1 Competition

2.1.1 Historical overview

This section gives a brief overview of how the term ‘competition’ has been shaped over time. It describes how the notion of competition developed and when competition as a term acquired its present meaning and usage. The next section demonstrates the importance and the benefits of competition. The aim of the present section is to help us better understand how competition reached its current prominence.

Most of the developed nations have dynamic economies, which requires them to be competitive and attractive in order to maximise the possibilities of capital pouring into and minimising the possibilities of capital leaking out their jurisdictions. It would be easy to think of competition as a quiet contest or a race involving intelligent and astute ideas, but historical facts testify otherwise. Historically, countries have always competed violently, either to assert their competitive advantage or to gain it. This violence has sometimes even degenerated into full-scale warfare.

History is rich in accounts of the competitive nature of humans. The story of the Apple of Discord from Hellenistic Greece, the tragedy of Abel and Cain in the Old Testament, the Roman legend of Romulus and Remus, and many others remind us that since the dawn of civilisation, competition has been a fascinating theme of legends. Indeed, this reasoning can go back to primitive humanoids or even to animals, because their lives were dictated by the competition for survival and reproduction in an environment with scarce or limited resources. Competition, therefore, is at the heart of many natural and social developments.

The role and nature of competition should not be overstated, however; some *caveats* are important. First, competition is only one of the driving forces in nature; in conjunction with other factors and elements, it contributes to the ensemble of social processes. In many cases, chaos and chance are more determinant than competitive advantages or strategies. Second, coordination and collaboration offer – under certain circumstances – better solutions compared to competition. Third, in developed societies, the need to compete is simply one of their main characteristics; humanism, altruism, and comradeship are in many cases considered more valuable.

Competition was neither discovered nor invented at any given time.⁴⁴ Instead, it was clarified and refined over time until it acquired its current meaning. Competition was first studied as a *phenomenon*, or as a situation that could be observed, and later as a *notion*, or as an understanding of its elements and contributions to society. To better clarify this, it is necessary to take a brief journey through the evolution of *competition* as a phenomenon and *competition* as a notion.

As a phenomenon, competition has been described by authors since antiquity. Aristotle was aware of it when discussing market exchange and prices. Hesiod gave an example of two potters' efforts to surpass each other in crafting the best pot, which created a 'good conflict'.⁴⁵ Other authors have used similar examples to exemplify the same phenomenon, and early economic writers described it by using words like *rivalry* or *emulation*.⁴⁶ These facts indicate that authors were aware of the phenomenon of competition, but the notion as it is known today was still in gestation.

However, only in the 16th century did *compete/competition* begin to be used in its current forms. Its usage can be traced back to the 16th century in England and earlier in Italy, Spain, and France. At that time, the Scholastic School led by Spanish authors used the verb *compete* simply to denote the fact of two merchants working together. Its use was equated with the verb *concur*, which has the same root. With the decline of the Scholastic School and the rise of Mercantilism, however, a shift from collaboration to strife occurred.

Scholars of the Mercantilist School were grappling with the idea of how to increase commerce and to profit from it, as well as of how to gain an edge on their commercial rivals. It is not surprising that analyses of this kind were undertaken by scholars from merchant cities or states. Dennis (1975) gives some examples. First, Botero, an Italian author, who in 1588 described a *competition* and *emulation* between city-states to construct attractive fairs for merchants, and in 1589 a *competition* and *emulation* of soldiers for military excellence.⁴⁷ Second, Wheeler (1601), an English author, who described the struggles of towns in the Low Countries to be preferred above their rivals and competitors in an effort to win the trade in North-East Europe. Subsequently, authors like Montchretien in

⁴⁴ Stigler (1957) 1.

⁴⁵ Dennis (1975) 3.

⁴⁶ In Greek writings, the verbs used to denote competition were *agon* (contest, struggle, battle), from which the words antagonism, protagonist derive; *amilla* (conflict or contest of superiority) came, from which the word emulation derives; *zelos* (jealousy or zeal); *eris* (strife, quarrel). See Dennis (1975) 3.

⁴⁷ Dennis (1975) 24.

1615 speak about competition as a source of progress and efficiency. These examples mark the first descriptions of competition between jurisdictions not merely as a fact but as a desirable process that governments should be aware of. It should be noted, however, that these authors were very vague, and did not elaborate on competition in the way that authors in the 18th and 19th century would do.

This period of mercantile thought was systematised further by authors of the Liberal Mercantilism School and, among others, by Forbonnais, Quesnay, and Baudeau.⁴⁸ Their main idea was that competition was an exchange of equivalents between individuals, and was therefore a limited but beneficial force in the economy. Adam Smith polished these authors' ideas, and attributed to competition between states a more positive role by showing how competition facilitates market exchange and creates conditions for a better use of resources. In Smith's view, within a free market framework, competing self-interested individuals would – as if guided by an invisible hand – converge to create more prosperity for society. Smith's invisible hand called for a 'healthy competition', in which self-interested individuals would compete but not at the expense of others: in other words, competition should be fair, as only in this way would it serve the greater good of increasing a nation's wealth.⁴⁹

With the emergence of socialist theories in the second half of the 19th century, classical liberalism and mercantilism entered into a crisis. In this period, the need to distinguish between 'primary' and 'secondary' income distribution and between 'individual' and 'class' created the conditions for a better understanding of competition. However, change from the classical to the neoclassical theory was slow, and needed the shift from mainly verbal reasoning to the mainly mathematical reasoning of the late 19th century. During this period, the concept of *perfect competition*⁵⁰ was created,⁵¹ but although it was supported by its

⁴⁸ Dennis (1975) 2.

⁴⁹ Skousen (2001) 23, 215.

⁵⁰ The Dictionary of Economics defines perfect competition as 'An idealized market situation in which all information is known to all market participants, and both buyers and sellers are so numerous that each is a price-taker, able to buy or sell any desired quantity without affecting the market price. It was once thought that these were the assumptions necessary to describe a competitive economy. This is not the case. Provided all market participants have symmetric information (but not necessarily complete information) and act as if they were price-takers, the competitive equilibrium will emerge'. See John Black, Nigar Hashimzade, and Gareth Myles, 'perfect competition', A Dictionary of Economics (5 ed., 2017) <<http://www.oxfordreference.com/view/10.1093/acref/9780198759430.001.0001/acref-9780198759430-e-2315>> accessed 22 December 2017.

⁵¹ Stigler (1957).

mathematical construction, it did not have solid evidence to support it in reality.⁵² Judging from the amount of legislation and the number of institutions dedicated to competition, it can be argued that competition is one of the most highly regarded values in modern societies.

Despite the rise and fall of different economic schools of thought, competition remains one of the ingredients needed to increase social development and economic wealth. It is hoped that the competition of jurisdictions in a field of law will bring the same or similar benefits that it is considered to bring to economies and societies in general. Competition among civil justice systems might also harvest the same benefits. The question at this point involves what precisely are the benefits that competition offers. The answer is in the following subsection.

2.1.2 Importance and benefits of competition

The social benefits of competition have long been observed, and since the 19th century, its economic benefits have been studied using increasingly more robust methodologies. It is hoped that the same benefits will apply in the competition of jurisdictions, and, more importantly, in the civil justice system competition. This section provides an overview of their importance.

Since the time of Adam Smith, competition has been considered the best form of market as opposed to monopoly, oligopoly, oligopsony, and so forth. On the one hand, competition is a situation in which the supply side is composed of many providers that fight each other to gain as much of the market as possible. In competition, suppliers are price takers, and they do not set the price. On the other hand, monopoly is a situation in which one or only a few firms form the supply side of the market. Being the only supplier results in many benefits for these firms, among others the ability to set the price, extract maximal profit – also known as monopoly rent – and thereby distort the market. The belief that competitive markets were superior to any other kind of market had significant consequences for academic thought and applied economics.⁵³

Authors of the Mercantilist and Liberal schools concluded that competition was necessary for an appropriate allocation of resources. Without it, countries and companies would not enjoy optimal economic and social outcome, as a combined result of resources misallocation, inefficiencies, and monopoly rents. Therefore, one of the reasons countries should protect competition was to make sure that resources were distributed efficiently. It can be argued that the competition between governments creates the same effects. It pressures governments to do a

⁵² Skousen (2001) 217, 353.

⁵³ Nickell (1996) 725.

better job allocating their resources and improving their efficiency. In this respect, state competitiveness is considered a key indicator of economic health. The World Economic Forum regularly publishes a Global Competitiveness Report that highlights the progress or regress of 140 economies in becoming more competitive and improving their productivity and prosperity.⁵⁴ Increasing competitiveness is considered a focal point of EU policies, and attempts by EU institutions to develop the single market further rely most of the time on the competitiveness of single Member States. As the 2016 Competitiveness Report affirms, competition is needed not only for economic growth but also for resilience in the event of economic downturns.⁵⁵

The above notion, streaming from the Mercantilist and Liberal schools, that competition is beneficial and necessary is not always shared by the market's active participants. Some of these players, mostly commercial companies, are not interested in the efficiency of resource allocation and productivity growth. Although studies focus on these, they do not take into account the companies' profitability. In some cases, profitability has an inverse relation to competition, because in highly competitive markets the profitability is lower compared to in less competitive markets. Therefore, to increase their profits, companies might be interested in a less competitive market.

Competition and monopoly are not insulated from each other. In a competitive market, a company may acquire large parts of the market and be in a dominant position. The risk of a competitive market shifting to become a monopoly market is always present. In these cases, it is important to have a supervisory body that can prevent such situations. For the most part, the government tries to ensure a certain amount of competitiveness, but the operative word is *tries*, because authors debate the role of the state in the market. There is an ongoing heated discussion on the theories ranging from *laissez faire* to the more interventionist notions. Nevertheless, scholars generally accept that unless competition is regulated and supervised, it risks becoming a monopoly or another less competitive type of market. With regard to the civil justice system competition, it is debatable which authority would be capable of supervising, but it is also important to consider the dangers that an increased intensity in the competition might pose to weaker parties. Although this discussion has more to do with competition between

⁵⁴ The latest edition of the Global Competitiveness Report is the 2015-2016 Report, which is available at <<http://reports.weforum.org/global-competitiveness-report-2015-2016/>> accessed 22 December 2017.

⁵⁵ Report on Single Market Integration and Competitiveness in the EU and its Member States, available at <http://ec.europa.eu/growth/industry/competitiveness/reports/single-market-integration-competitiveness_en> accessed 22 December 2017.

companies, Chapter 4 provides an analysis of the consequences of an intense competition involving court adjudication as a good.

It can be argued that competition also affects managers and workers. Through their mechanisms, competitive markets require managers to be more efficient and to step up their efforts to manage their company effectively. The same reasoning applies to workers. In a competitive economy, workers are required to be more efficient and to apply their labour skills in an optimal manner. If the civil justice system competition can be compared with the competition between companies, there would be reason for concern. Competing states that require courts to be efficient might do so to the detriment of certain procedures – in particular, those in support of weaker parties – or that uphold important principles of justice.

Apart from the behaviour of workers and managers, competition affects research and development. In competitive markets, companies try to reduce costs by researching and developing more efficient production methods as well as better products to attract buyers and to increase their revenue. It would be logical to think that companies in a monopoly situation have few incentives to improve their products or to change them. However, this is not true. In fact, such companies have stable streams of revenue and a dominant position in the market, allowing them to invest and to maintain consistent progress in research and development.⁵⁶ Competing firms might be too afraid to change the already fragile market situation, and thus play a passive role in this area. Can this be expected of the civil justice system competition? Research and development with regard to courts and legal procedures can be expected if litigants choose legal and infrastructure development as criteria for their choice, thus incentivising competing states to invest in such measures.

However, competition does not work by forcing parties to be more effective or more productive, or to undertake more research. It works by creating and offering many alternatives. In the end, the most appreciated product or a set of the most appreciated products will survive.⁵⁷ This means that the best or the cheapest product will not always win; it is often simply a matter of luck that one product becomes more appealing than the other. This conclusion is similar to that regarding evolutionary biology; namely, competition in nature favours neither the best nor the strongest, but the one that happens to be more capable of adaptation.

⁵⁶ Nickell (1996) 728. This idea was proposed by Joseph Schumpeter, who considered that once a company reaches a monopolistic status, it would continue to defend its position by investing more in research and development. This in turn would create a gap between the monopolist and potential competitors.

⁵⁷ Nickell (1996) 741.

As previously mentioned, not only companies compete. Counties and smaller jurisdictional units within one state may compete with each other. Moreover, it has been argued that competition between nations is a key element in their progress and advancement in technology and social welfare. The example of Europe and China serves to show the extent to which competition can change history. In the Middle Ages, China was highly advanced and more prosperous than Europe. Furthermore, it was unified as compared to a dis-unified Europe.⁵⁸ A unified China had little interest in changing its already established progress and stability, while change and progress in Europe was prompted by the competitive attitude of the many small states. However, because of its hard work and competitive nature, Europe by the beginning of the 20th century was more progressive and advanced in comparison to China.

Competition between nations also indirectly promotes economic growth and innovation with regard to non-competing states. While the process of competition between nations might not be of interest to some states, the developments and innovations produced by competing states also indirectly carry those that do not compete. A good example of this relates to the last rulers of Japan in the Shogun period; they refused to accept guns, fearing that these weapons would put an end to their power, but in effect they led their country to a period of submission to European powers. In a certain way, choosing not to compete is not an option; therefore the majority of the countries also develop as an indirect result of competition.⁵⁹ The same can be argued for the civil justice system competition. The innovations and developments produced by competing states also foster the development of countries that do not compete.

As shown, competition is a wide-ranging process with indirect and direct consequences for companies, individuals, and countries. It is a process through which actors and regulators adapt to and reshape their environment, resulting in a higher and more stable long-term growth. Competition induces actors to use their resources more effectively and to increase productivity. Considering these benefits, many countries agree to enter into competition, fearing that other competitive countries might surpass them. Some of this section's findings can be transposed to the civil justice system competition. However, although the benefits derived from competition are certainly desirable, attention should also be paid to undesired side-effects, some of which will be assessed in the following subsections.

⁵⁸ Diamond (1998) 331.

⁵⁹ Chaudhry and Garner (2006) 667.

2.1.3 Importance and benefits of competition: knowledge and social order

As discussed above, competition has attracted the attention of many scholars throughout the course of history. Among others, Adam Smith is considered one of the most influential authors who promoted competition as a perfect ingredient of the market.⁶⁰ He was part of the Scottish Enlightenment Movement, which had a similar perspective. In accordance with Smith's ideas, Friedrich Hayek (1948) developed a Theory of Spontaneous Social Order, and promoted competition to a leading mechanism in the development of society.⁶¹ This section briefly discusses the ideas of the Scottish Enlightenment Movement, and then Friedrich Hayek's Theory of Spontaneous Social Order. The focus of the discussion will be on the role of competition in these theories and on their relevance for the current study.

Adam Smith, David Hume, and Adam Ferguson were part of a generation of Scottish thinkers who established the Scottish Enlightenment Movement of the 18th century. Their common idea was that social phenomena could be explained in terms of individual actions.⁶² According to them, institutions and social behaviour could be considered a combination of the individual actions. In other words, individuals in every society strive to achieve their personal goals, and in doing so they experiment with new behaviour, new solutions, or new variations, and as a result they establish patterns. If one of these patterns is adopted by a large number of people, it can create a new social institution, a new social norm, or a new social code of conduct. Upon these ideas are based Smith's concept of the 'invisible hand' in the market, and Ferguson's concept of social institutions deriving from human actions and not from human designs.⁶³ For Smith, a free market could be self-regulated, because by pursuing their individual goals, individuals would end up creating rules that in turn would regulate their actions in the market.

Individual behaviour varies widely, however, and individuals do not have the same solution for the same problem. Social norms emerge from the behaviour of individuals by way of the competition process. As mentioned above, individuals try to reach their goals by experimenting with new behaviour, new solutions, or

⁶⁰ Skousen (2001) 20. On competition considered by Smith as one of the three crucial ingredients, see Skousen (2001) 22. See also McNulty's discussion on how Adam Smith used the notion of competition, McNulty (1967). For more insights, see also Dennis (1975) 88.

⁶¹ Vanberg (1986); Powell and Stringham (2009) 21; Hayek (1948) 10, 50.

⁶² Vanberg (2014b) 100; Vanberg (1986) 80; Boettke (1990) 63; Hayek (1948).

⁶³ Vanberg (1986) 80.

new variations.⁶⁴ These *behaviours* confront each other and involuntarily or voluntarily enter into competition. The most successful behaviour wins, and becomes a rule or a norm in society, and, at the same time, it becomes the target of new experiments that can become the future dominating norms.⁶⁵

The idea of individuals competing and producing social norms that affect the whole group has a homologue in Charles Darwin's theory of evolution. Writing after the Scottish Enlightenment, Darwin demonstrated that evolution, through a process of variation, selection, and retention, produced individuals that were more successful to overcome the challenges presented in their living environment. Inspired by the Scottish Enlightenment and the Theory of Evolution, Donald Campbell, Karl Popper, and Friedrich Hayek became proponents of the evolutionary epistemology way of thinking. This theory proposes that knowledge is accumulated through trial and error, a process in which new ideas are tried and inspected for their veracity;⁶⁶ hence, although an oversimplification of evolutionary epistemology, all ideas are good unless otherwise proven.

Hayek went beyond evolutionary epistemology, however, and created his Theory of Spontaneous Order and Cultural Evolution,⁶⁷ which was an advancement of the thoughts of the Scottish Enlightenment authors, and especially of Adam Smith's concept of a self-regulated market.⁶⁸ According to Hayek, individuals that pursued their own interests created the basis for the accumulation of *knowledge*, which was the aggregate knowledge of every individual in the market. While competing with each other, individuals explored new ways of winning, and therefore accumulated more knowledge. They did this without knowing the outcome of their actions, but proceeded through trial and error experimentation.⁶⁹ Competition in this sense is considered a process of discovery and understanding, where the accumulated *knowledge* allows for the creation of rules and norms of behaviour in the market. Norms created in this process regulate the market itself, and are considered to be optimal norms because they are fruits of an aggregate

⁶⁴ To keep the discussion simple, *behaviour* will be used and will include 'solutions' and 'variations'.

⁶⁵ To describe this, just think how quickly fashion changes. Individuals begin to experiment with new behaviour and new clothing that at some point become the norm for most people. This theory explains not only social norms but legal ones as well.

⁶⁶ Vanberg (2014b) 101; Vanberg (2014a) 3; Vanberg (1994b) 96.

⁶⁷ There is some debate on the relation between evolutionary epistemology and the Theory of Spontaneous Order. The discussion is centred on the chicken-or-the-egg idea of which derived from which. Given that the two concepts were conceived and developed at the same time, they might have been in a symbiotic relationship, enhancing each other.

⁶⁸ Vanberg (1994b) 63-64, 81-85; Skousen (2001) 214; Stringham and Zywicki (2011).

⁶⁹ Vanberg (2014a) discusses more on the concept of 'blindness' in Hayek's work. See as well Boettke (1990) 70, 74.

knowledge.⁷⁰ Starting from this point, Hayek suggested that the same ideas could be applied to other social institutions.⁷¹ According to him, social coordination, social norms, and social institutions emerge from the self-interested behaviour of individuals, without any given institutional framework,⁷² and the self-regulation of the market is simply a manifestation of this process.

For Hayek, spontaneous order can emerge from the interaction of a multiplicity of elements that are governed by certain rules. Their character will determine the general features of the system, while the specifics will be dependent on circumstances. Rules are of two kinds: innate (genetically inherited) and learned (culturally transmitted). Innate rules are presumed to be uniform in time and space, because they are fruit of the long process of human evolution.⁷³ These rules create the first framework in which individuals act. While individuals pursue their goals, they create behavioural regularities that prevail over the others because the group benefits from them.⁷⁴ Some of these regularities are given formal recognition by a governmental power, while others remain in use as social norms. Norms created in this way are the product of a double-layered competition process. At first there is a competition between individuals, where the diverse behaviours of different individuals are confronted, and a single one or a very small number are adopted by the group. Next, the behaviour acquired by the group is confronted by the behaviour of other groups. In this competitive process, the optimal norm is preferred. Nothing in this process guarantees that the best norm will emerge, but it ensures that that norm will always face competition so that it is able to change if the conditions for its emergence disappear.⁷⁵

In conclusion, it can be said that Hayek's theory of Spontaneous Social Order and the role of competition in its creation is relevant to the current research in three ways. First, it shows that competition encourages a process of discovery and the accumulation of knowledge. On the one hand, optimal norms emerge through the competition process, while on the other hand, the competition process maintains the norm, updated in accordance with the actual needs of the group. Based on this, it can be argued that the civil justice system competition would create a process of discovery, and promote legal innovation more optimally than a situation in

⁷⁰ Boettke (1990).

⁷¹ Hayek (1948) 77-92.

⁷² Boettke (1990) 70-73 summarises the criticisms of this idea.

⁷³ Vanberg (1986) 77.

⁷⁴ Hayek is criticised on this point, as during his career he first believed that behaviour regularities prevailed because they benefitted the individual, and later he changed it to the group. It must be said that critics do not give enough importance to the competition between groups. For more, see Vanberg (1986) 83.

⁷⁵ Hayek's theory has received some criticism (see footnote 72), but critics have not touched on the role of competition as a factor in the spontaneous development of social order.

which competition was absent. Second, it shows that the competition of norms and groups (jurisdictions, states, or other) can produce optimal results in terms of norms and institutions. Given that the government cannot reach the level of aggregate knowledge that individuals have, it would be better to submit legal norms and institutions to a competition process. This means that the civil justice system competition could lead to new rules that would better serve the needs of court users, and provide better rules compared to what law makers can offer. Third, Hayek's theory can be a useful contribution to the general discussion on the harmonisation of civil procedures in the EU.⁷⁶ If indeed competition produces optimal rules, the EU should welcome the competition between jurisdictions, and, for the sake of harmonisation, select the rule(s) that emerges as the most preferred.⁷⁷ Problems exist of course, but if harmonisation is desired, competition might be the way to go. In this regard, the civil justice system competition can display and highlight whichever legal rules are more optimal, and are appreciated by users and governments alike. Any one of these rules could be the model for future harmonisation steps.

2.1.4 Importance and benefits of competition: Tiebout's theory

In the mid-1950s, the work of Richard Musgrave and Paul Samuelson on public finances was based on the approach that there was no 'market type' solution to determine the level of expenditures on public goods.⁷⁸ When Tiebout tried to explain his solution in one of Musgrave's seminars, he was not taken seriously.⁷⁹ Nevertheless, he did not despair, and in 1956, while an assistant professor at Northwestern University, he published his now famous paper 'A pure theory of local expenditures'. The paper remained obscure, however, and for some time attracted little attention. Tiebout wrote three other articles related to his 1956 article, but none fared any better. After 1962, Tiebout stopped writing on public finance topics. He died in 1968.

Before Tiebout's paper, Musgrave and Samuelson were busy identifying a mechanism that would register the preferences of the public for public goods. While private good preferences are registered by market mechanisms like price and demand-supply interaction, public goods are different from private goods, and market mechanisms do not apply entirely.⁸⁰ In his paper, Tiebout explained a

⁷⁶ On the relation between harmonisation of civil procedure and the competition of civil justice systems, see Chapter 3.

⁷⁷ It can be argued that at this moment competition would cease; however, the spontaneous competition of rules should be allowed as soon as need demands it.

⁷⁸ Tiebout (1956) 416.

⁷⁹ Fischel (2006) 2-3; on the negative reaction of the Musgrave school, see Vaubel (2008) 44.

⁸⁰ Tiebout (1956) 417. Section 4.2 provides a critical overview of the different kinds of goods and their definition. It is also important to note that dispute resolution and the civil justice

mechanism that would help governments register the public's preferences more efficiently, and consequently do a better job of allocating resources at the local level. The usual mechanism is one whereby consumers can express their opinion by voting for the various policies proposed by politicians.⁸¹ The problem with this mechanism is that many consumers do not vote at all, or they understate their preferences in order to avoid taxes. Therefore, in addition to the problem of allocating resources efficiently, the free-rider problem emerges. A solution to this would be to force consumers to express their opinion, so that the government would be able to satisfy and tax them accordingly. However, this is not possible. Hence, Tiebout proposed a mechanism whereby consumer-voters could select the community that best matched their preference pattern for public goods. This mechanism is based on the following seven assumptions: consumers are fully mobile, and will move to the community that best satisfies their needs; consumers have full knowledge of revenue and expenditures in different locations, and they respond accordingly; a large number of feasible communities exist; employment restrictions are not considered; there are no external economies or diseconomies between communities; communities below the optimal size try to attract residents, while communities above the optimal size do the opposite; and communities with the optimal number of residents try to keep this number unchanged: in other words, communities try to reach their optimal size. The idea proposed by Tiebout is that communities, jurisdictions, or any similar organisations offer a different pattern of public goods. For the model to work properly, it is assumed that consumers will try to find the community that best fulfils their needs by keeping its products constant. The basic movement will be from communities larger than their optimal size to communities that are smaller. Communities larger than their ideal size will not perform optimally, so they will not completely satisfy consumers' needs and wants.⁸² Dissatisfied consumers will move to a different community that is to a certain extent similar to the old one; at the same time, communities that have reached their optimal size will begin to restrict migration to their jurisdiction. In this way, consumer-voters will be constantly on the move, and will vote with their feet for the community that best serves their needs. Moving or failing to move replaces the usual market willingness to buy or not buy a good, and reveals consumers' desire for public goods. Once it is understood

systems are special kinds of goods, which means that market mechanisms affect them differently in comparison to other goods.

⁸¹ This is the classical political scenario: voters vote for different alternatives regarding expenditure on public goods that are either presented by different candidates or by the same person or institution.

⁸² It is accepted that two or more communities with the same patterns might exist.

exactly what consumers want, communities can tax them accordingly and allocate resources efficiently.

Musgrave and Samuelson took note of Tiebout's paper, but held it to be unrealistic. In general, the paper remained obscure for historical reasons.⁸³ First, it was published during a period when the Cold War was attracting considerable attention, and communist centralisation was believed to be the wave of the future.⁸⁴ No one was prepared to see decentralisation and competition among jurisdictions as a serious possibility. Second, local governments at that time were labouring beneath a cloud of negative associations. Therefore, any policies or theories that would grant them more power were not warmly received. To these historical reasons, it should be added that after 1962 Tiebout apparently lost interest in the topic.

Tiebout's model of course does not answer every question.⁸⁵ It can be argued that the model relies on the notion of a rational person who makes choices based only on economic terms, and without taking into account the emotional and other non-economic factors. Furthermore, the model is based on seven assumptions that are highly unlikely to occur simultaneously; in fact, it is rare for any one of them to occur even singly. Moreover, Tiebout neglected property taxation and land use regulation,⁸⁶ conceding that his proposed solution was a conceptual one.⁸⁷ Its aim was to show that in a multitude of communities, consumers would choose the one that best fulfilled their wants and thus create a type of market for public goods where governments could understand the preferences of consumers and adjust their expenditures and taxation accordingly. In the end, Tiebout's paper proposed a hypothesis, and only time and empirical evidence would determine whether it was true. Despite the title, however, it does not evolve into a full theory; hence, many authors refer to it as 'hypothesis', 'suggestion', 'idea', and so on.

The competition of jurisdictions as described by Tiebout can be applied to describe a theoretical scenario involving the civil justice system competition in the EU. This scenario would work under the following assumptions, which are an adaptation of Tiebout's original assumptions. First, litigants are fully mobile. There are no or limited barriers to litigating in the courts of another jurisdiction, and litigants choose the court that best satisfies their preferences.⁸⁸ Second,

⁸³ Fischel (2006) 5-6.

⁸⁴ Fischel (2006) 7.

⁸⁵ Tiebout (1956) 424.

⁸⁶ Fischel (2006) 9.

⁸⁷ Tiebout (1956) 424.

⁸⁸ In the European Union, mobility is guaranteed by the Brussels I (recast) Regulation: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12

litigants have full knowledge of all the jurisdictions, including legislation, expenses, and revenue. As was explained in Sections 2.1 and 2.1.3, knowledge is important for the development of competition. The more widespread the knowledge, the more beneficial for competition. Third, all Member States – or most of them – compete. A relatively large number of competing jurisdictions is needed to provide potential litigants with a plurality of choices as well as of arrangements for the dispute resolution system. Fourth, there are no restrictions or limited obstacles to the use of lawyers from outside the jurisdiction. Apart from legal requirements, there are two major obstacles to the mobility of lawyers: the language used in a jurisdiction and the lack of knowledge regarding that jurisdiction’s legislation. If these obstacles are overcome, the mobility of lawyers would greatly facilitate the mobility of their clients.⁸⁹ Fifth, there is an optimal caseload for every jurisdiction, meaning that when a jurisdiction reaches a certain number of cases, it uses its resources in an optimal way. A lower or a higher number of cases means that resources are being either wasted or overexploited. Sixth, governments try to reach this optimal level.

In this system, litigants would try to find the court and jurisdiction that best fulfilled their needs. It is reasonable to think that litigants have different sets of preferences and needs, and it can therefore be assumed that each of them would have different choice preferences. Having no problem with mobility, for instance, litigants from Portugal would go to Finland to litigate or *vice versa*. Member States on their own would try to reach their optimal caseload level either by increasing or decreasing the number of cases they could handle. If they had too many cases, they would restrict access to their courts by creating legal barriers; if they had not reached the optimal caseload level, they would relax their legal barriers or undertake other activities to invite litigants to their courts.⁹⁰ Under

December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p. 1–32.

The recast Regulation sets the rules on jurisdiction and for the choice of court in the EU. It allows commercial parties to choose the court that best serves their needs. The ample mobility allowed and guaranteed by the recast Regulation would serve as the basis of the first assumption. Chapter 3 provides a short analysis of the importance of the Brussels I Regulation for the civil justice system competition.

⁸⁹ Section 4.3 argues that in the client-lawyer relationship, the lawyer has a dominant position. This allows lawyers to make legal choices on behalf of their clients, including choice of court. In view of this, more mobility for lawyers would translate into more mobility for litigants.

⁹⁰ It should be said that governments generally have a constitutional duty to provide access to justice to their citizens. Therefore, legal barriers will be targeting the access to justice of foreign citizens. Many procedural requirements tend to restrict access to courts only to those cases considered by the governments to be important. In this regard, see also the discussion in Section 4.2.

these conditions, litigants would have more choice options to satisfy their needs, while governments would be better able to assess what litigants want and thus to allocate their resources more efficiently. Some governments would find it unappealing to continue with the competition, and would retire from it, while others would feel encouraged to take part. A possible consequence of governments offering different litigation solutions could also be the emergence of new dispute resolution mechanisms or specialised courts in different states. In this scenario – created on the basis of Tiebout’s theory and assumptions – there seems to be more than one beneficiary. The first beneficiaries were those governments that were better able to understand litigants’ preferences and to allocate their resources accordingly. The second beneficiaries in this scenario, which were the litigants, had more diversity in their choice of court.

However, this model remains a fantasy.⁹¹ Wagner claims that the Tiebout model is not realistic, because its assumptions are highly improbable, and they do not take into account mobility problems related to different languages and cultures among countries in the EU. While this problem can easily be overcome by claiming that English is already the language set to be used in cross-border litigation, some of the assumptions made by Tiebout and mentioned above are still highly improbable. Nevertheless, the model is valuable in that it offers an idea of what competition can offer to governments and litigants. Furthermore, some of the assumptions and the mechanisms described here are not entirely speculative. Stripped of all its merits, the model can still be used by governments to study their own behaviour in the competition of civil justice systems.

2.2 Orthodox and heterodox competition

Economists often use the term competition, but they do not share the same view of or approach to it. This section provides a brief overview of the debate on the use of the term in economic scholarship, and concludes with a comment on the importance of this debate for the present research. It is important for this research because when the term is used in the competition of jurisdictions, its orthodox meaning is implied. At the same time, this study considers the heterodox approach better equipped to represent the findings of this and other related studies.

Economic scholarship has an abundance of ideas and theories that generate movements and schools of thought. One major division in scholarship is that between *orthodox* and *heterodox* economics. The labelling is problematic in that it lacks a clear definition of either term. The general rule would be that *orthodox*

⁹¹ Wagner (2013) 351.

economics is used to describe mainstream economics, while *heterodox* is used to describe all others that are not mainstream.⁹² As regards competition, *orthodox* economics is centred on *neo-classical economics*,⁹³ while *heterodox economics* refers to all others that are not affiliated with the neo-classical view. Among the *heterodox* scholars are Karl Marx,⁹⁴ Joseph Schumpeter, and Piero Sraffa;⁹⁵ among the *heterodox* schools⁹⁶ are part of the Austrian School of Economics, The Oxford Economists' Research Group (OERG), classical economics,⁹⁷ post-Keynesian economists, and Evolutionary Economics.⁹⁸

For neo-classical economics, competition is a crucial concept, and as a term it was inherited by the classical school and the Scottish Enlightenment Movement. This term is so important that scholars view it as if it were their religion.⁹⁹ Neo-classical economics considers competition in terms of *perfect* and *imperfect*. Perfect competition is the positive side, and occurs in a situation in which there is '*a large number of relatively small buyers and sellers, each acting on the belief that he or she cannot affect the market price*'.¹⁰⁰ The negative side, imperfect competition, is mostly connected with a monopoly situation, in which the seller sets the price for all the buyers. Other situations also exist in which perfect competition is disturbed and should be considered imperfect. In these situations, productivity falls and the resources are not properly allocated. The aim of the neo-classical school is to reach the equilibrium of perfect competition, which would create perfect competitive markets.¹⁰¹ Therefore, the more competition, the better.

⁹² The problem remains in defining the term *mainstream*. What precisely is *mainstream*, and how does one know that something is *mainstream*? It can be said that the term is used in an axiomatic way. Everyone knows what it is, but no one can explain what it means.

⁹³ Black, John, Nigar Hashimzade, and Gareth Myles, 'neoclassical economics' A Dictionary of Economics (4th ed., 2013) <<http://www.oxfordreference.com/view/10.1093/acref/9780199696321.001.0001/acref-9780199696321-e-2093>> accessed 22 December 2017.

⁹⁴ The Neo-Marxian view differs from the Marxian view on competition; for this, sometimes they are not considered to be *heterodox*. For this, see Bina (2013) 75. Marxian refers to the economic theories of Karl Marx, while Marxism refers to his political and social theories. It might be said that Marx would not be happy about this distinction.

⁹⁵ Weeks (2013) 14.

⁹⁶ Bina lists post-Keynesian as a neo-classical school. See Bina (2013) 55.

⁹⁷ Adam Smith, John Stuart Mill, David Ricardo, and Karl Marx are considered the fathers of classical economics. The term was coined by Marx himself in referring to Smith, Mill, and Ricardo, but many authors include him in this list. Others do not, however, and refer to his thoughts as Marxian. Other scholars associate Marx with the other classics, and refer to them as classical/Marxian theory. Bahçe and Eres (2013).

⁹⁸ High (2013) 93.

⁹⁹ Weeks (2013) 13.

¹⁰⁰ Weeks (2013) 15.

¹⁰¹ Weeks (2013) 13, Moudud (2013) 27.

Heterodox economists contend that orthodox economists do not have a system in place to determine whether more competition is better,¹⁰² and their analysis is based on falsity.¹⁰³ Falsity is related to the use of the terms ‘perfect competition’ and ‘monopoly’, which for heterodox economists do not exist.¹⁰⁴ In fact, the world is characterised by pervasive monopolies,¹⁰⁵ and competition is neither perfect nor imperfect – it is simply *real*.¹⁰⁶ In their view, on the one hand, sellers continually set the price, and on the other hand, they are constrained by the number and the size of other sellers participating in the market. This means that competition is not a point of equilibrium but a dynamic process that influences the economy.

For heterodox economists, competition is a historical process, differing from period to period and from place to place. In their view, competition is a form of rivalry for gain – an attempt to outdo other rivals for a larger share of the market.¹⁰⁷ To describe this form of competition, heterodox scholars accept Schumpeter’s theory of innovation, enterprise, and competition, and his other theory of creative destruction. The first theory can be described as a three-stage process. The first is innovation, where a new business tries to enter a market by innovating the ways of production, the labour conditions, the use of resources, and any other activity that would cause the price of its product to fall below the price of its rivals’ good.¹⁰⁸ The second is competition, where different products that are the result of innovations are confronted with each other in the market. The third stage is acceptance, which determines which firm has won the competition. To win in the last stage, a product or an innovation needs to grow faster than that of its rivals, thus allowing it to capture more of the market share and therefore become more successful. This three-stage competition creates a dynamic framework composed of a qualitative (innovation and competition stage) and a quantitative element (acceptance stage).

In this view, competition promotes innovation as an essential stage geared to beat the rivalry.¹⁰⁹ This leads to change in the structure of firms, in the methods of production, and in the order of business.¹¹⁰ Order of business is based on the

¹⁰² Weeks (2013) 14, 19; Bina (2013) 71, 72; High (2013) 89, 93; Lee (2013) 161, 169.

¹⁰³ Bina (2013) 71-76.

¹⁰⁴ Bina (2013) 56-58, 72.

¹⁰⁵ Moudud (2013) 27.

¹⁰⁶ Bina (2013) 57, 74.

¹⁰⁷ High labels this process as catallactic competition, and claims it is based on the writings of Mill, Schumpeter, and Marx. High (2013) 89.

¹⁰⁸ Metcalfe (2013) 112-115.

¹⁰⁹ For other insights on the emergence of innovation see: Moudud (2013) 46.

¹¹⁰ High (2013) 104.

principle of the *invisible hand*, where managers and directors change the structure and form a business to match the requirements of their production plans. Market order emerges from the interaction of different individuals pursuing their goals following established rules of conduct.¹¹¹

This section has provided a short description of two different approaches to competition in economics. The intention was to distinguish which is better suited to the study of regulatory competition. The present research considers that both the orthodox and the heterodox approach are scientifically robust, but that the heterodox approach is better suited to describe the civil justice system competition. The civil justice system competition is a process in which suppliers behave like monopolists and set the price of the good they offer, with little regard for the supply-demand interaction. In the orthodox view, this means that resources are not allocated properly, and that productivity (i.e. conflict resolution) is low. In the heterodox (at least Schumpeter's) approach, the situation is indeed a monopoly, considering that the government is the only supplier of the court dispute resolution mechanism. However, the government is in constant competition with alternative mechanisms as well as with other governments. From the heterodox perspective, this monopoly is porous. From the orthodox angle, a monopolistic producer would have little to no incentive to innovate. But in a porous monopoly, innovation comes with a need to respond to competitors that penetrate the seemingly monopolistic market. Ultimately, the civil justice system competition creates the conditions for innovation and development. Even if the civil justice system competition were dominated by a single supplier, innovation and development would still make their way into the market.

2.3 Regulatory competition in different fields of law

The previous sections introduced the topic of competition, with particular attention given to regulatory competition and the competition of civil justice systems. The current section provides a brief overview of the competition between jurisdictions in different fields of law. These cases serve as examples and models geared to enhance our understanding of the competition of civil justice systems by demonstrating the effects on participating jurisdictions. To that end, this section will discuss four fields of law in which scholars have been particularly active: namely, company, tax, labour, and environmental.

¹¹¹ High (2013) 87. This is in line with what was discussed in Section 2.1.3. As a member of the Austrian School of Economics, Hayek was sceptical of the orthodox view.

2.3.1 Competition in company law

Competition in company law or – as it is often referred to – ‘competition for incorporation’ can be described as a process whereby two or more jurisdictions compete with each other to persuade companies to incorporate or to move their seat to one of these jurisdictions. As legal entities, companies choose a place of incorporation,¹¹² and as a consequence of this choice the company submits itself to the laws, regulations, and legal framework of the jurisdiction in which it is registered. This legal framework regulates, among others, the rights and duties of managers, shareholders, minority shareholders, takeover actions, and many other details related to the functioning of a company. Furthermore, choosing the seat of a company also includes the tax jurisdiction. The taxation level is another factor taken into account during incorporation, but is omitted in this section in order to simplify the analysis. Thus, the law of the jurisdiction where a company is seated is significant with respect to the relation between managers, shareholders, and third parties. As regards large companies, powerful interests are at stake, making the choice of seat and the reasons behind the choice a sensitive topic.¹¹³

In the US, scholarship involving competition in company law is particularly abundant. As Kahan and Kamar (2002)¹¹⁴ observed, discussions on the

¹¹² This is possible in jurisdictions that apply the incorporation theory. In these jurisdictions, companies can register without needing to produce or undertake activities there.

¹¹³ There are two theories for the incorporation of a company. One is the real-seat theory, which considers the place of incorporation to be where the actual head of the company is located, or where most of the commercial activity of the company takes place. The other is the incorporation theory, which considers the place of incorporation to be where the company was incorporated. In the EU, Member States are divided into followers of the real-seat theory and followers of the incorporation theory. This division, however, is problematic, considering the attempts to create a single market in the EU. Some landmark cases from the CJEU may have managed to overcome these problems. In *Centros*, the Court decided that Member States cannot refuse the recognition of the branch of a company that carries out business only in the State where the branch is established. Choosing between the laws of different Member States does not constitute an abuse of the right of establishment. Judgment of the Court of 9 March 1999, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*. Case C-212/97. European Court Reports 1999 I-01459.

In *Überseering*, the Court decided that Member States cannot refuse the recognition of a company legally established in the jurisdiction of another Member State. Judgment of the Court of 5 November 2002, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*. Case C-208/00. European Court Reports 2002 I-09919.

In *Inspire Art*, the Court decided that Member States cannot ask companies already registered in another Member State to fulfil additional requirements to be recognised as companies in the new Member States. Judgment of the Court of 30 September 2003, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*. Case C-167/01. European Court Reports 2003 I-10155.

Without forgetting to mention *Cartesio* and *Vale* as landmark decisions of the Court, it can be argued that the court favours the incorporation theory over the real seat theory.

¹¹⁴ Kahan and Kamar (2002) 727.

competition of jurisdictions have been going on since at least the 1900s, during which time several US states were competing with New Jersey to attract the registration of companies in their jurisdiction. It has been reported that in addition to New Jersey, states actively promoting themselves as incorporation centres were West Virginia, Delaware, Maryland, and Maine. This competition started when technological advancements made it possible for companies to transfer their production units away from their decision-making centres.¹¹⁵ At that point, competition between states began to intensify, and New Jersey emerged as the dominant jurisdiction. Other states considered New Jersey's legislation a reference point, and continued to improve their company law legislation. At that time, New Jersey was a centre of legal innovation aimed at being as attractive as possible for new companies. This position might well have been maintained until the present, but in 1912 – for political reasons – New Jersey renounced that position.¹¹⁶ After New Jersey's withdrawal, Delaware became the dominant venue for incorporation in the US, and to this day it accounts for half of the incorporation registrations in the US; in comparison, other states have only a minor percentage.¹¹⁷

On the basis of several studies, scholars¹¹⁸ debate whether competition for incorporation is a profitable activity for states, although certain profit sources are mentioned as being of interest for competing states or jurisdictions. The first and most obvious source of profit is taxes. In this respect, it can be said that a jurisdiction gains direct and indirect taxes from incorporating firms. Direct gains include incorporation fees and annual taxes on incorporation, while indirect gains include taxes paid by local law firms that have benefitted by providing legal services to newly incorporating firms. A second and less obvious gain and incentive is the creation of an attractive and hospitable business environment for investors. In other words, it is debatable whether the profit from direct and indirect sources is higher than the expenses incurred during competition. Some studies show that states in the US do not enjoy any significant economic gain. These studies also demonstrate that legislative changes in the last few years have been promoting not competition but other political or social goals.¹¹⁹ Competition was apparently not high on the political agenda of state governments. Furthermore,

¹¹⁵ Kamar (2006) 1766.

¹¹⁶ In that year, Woodrow Wilson, at that time Governor of New Jersey, was in the middle of his presidential campaign. Part of his political platform was to dismantle business monopolies. His rival, Theodore Roosevelt challenged him by pointing out that Wilson had done nothing similar in New Jersey. Wilson responded by personally pushing a series of laws known as *the Seven Sisters*, which outlawed trusts and holdings, and ended New Jersey's dominance in the competition for incorporation. Kahan and Kamar (2002) 731.

¹¹⁷ Bebchuk, Cohen, and Ferrell (2002) 1778.

¹¹⁸ As reported by Kahan and Kamar (2002) 687.

¹¹⁹ Kahan and Kamar (2002) 701-723.

different sources consider Delaware to be the winner of the competition in the US, and they also confirm that no other state is interested in the competition for incorporation.¹²⁰ In a certain way, competition for incorporation in the US was killed by Delaware's success.

Nevertheless, the academic debate on the effects of competition is still lively. A first topic of contention has to do with whether a competition of jurisdictions produces a race-to-the-top or a race-to-the-bottom as regards the quality of law.¹²¹ Defenders of the race-to-the-bottom consider that owing to the competition for incorporation, corporate law favours managers more than shareholders, and, in general, stronger parties more than weaker ones.¹²² Delaware is considered by some to be an example of the race-to-the-bottom,¹²³ while others consider it an example of the race-to-the-top.¹²⁴ A race-to-the-top means that the quality of law is improving, and weaker parties in general are offered more protection. Managers and stronger parties are usually better equipped to lobby for their rights. Given that shareholders are scattered and not always residents of the incorporating jurisdictions, they have little say in the drafting and approval of jurisdictions. Managers have more power and more information compared to shareholders, and are better equipped to pursue lobbying activities.¹²⁵ Therefore, it is not surprising that company law in the US favours managers as opposed to shareholders.

A second topic of debate concerns whether competition encourages predictability and innovation. When discussing the relationship between innovation and competition, it is best to refer to Sections 2.1 and 2.1.3, where it was demonstrated that competition indeed promotes innovation and the accumulation of knowledge. In fact, as regards innovation, Delaware – as a competing state – is more receptive compared to non-competing jurisdictions. Delaware keeps its legislation up to date and tries to refresh it in accordance with new trends and innovations, while non-competing jurisdictions, since they do not compete, have few incentives to innovate. Innovation would be present, regardless of the intensity of the competition. The intensity would influence the speed of innovation, where the more intense the competition, the faster the legislative innovation, and the less

¹²⁰ Bebchuk, Cohen, and Ferrell (2002) 1778, Roe (2003) 591-593.

¹²¹ This will be further discussed in Section 2.4, in a brief account of the scholarship's findings. See also Heine (2003) 103-105.

¹²² Roe (2003) 595; Kamar (2006) 1727.

¹²³ Lombardo (2009) 630-631; Roe (2003) 595; Charney (1991) 426.

¹²⁴ Kahan and Kamar (2002) 735.

¹²⁵ Kahan and Kamar claim that the competition of jurisdictions is stagnant in the US; the effects on law are not the same as in a competitive situation. In the current situation, the law in Delaware and in other non-competing states tends to favour managers more than in a situation of competition. See Kahan and Kamar (2002) 736-741.

intense the competition (Delaware case), the slower the innovation. The present research considers that competition influences innovation in a different way in comparison to predictability. In general, non-competing jurisdictions either do not innovate their legislation or they do so very slowly. As a consequence, these states have time to clarify and metabolise the legislation they use. Of course, many lack the infrastructure established by Delaware,¹²⁶ but this study considers countries in legal stagnation to be negentropic in legal reasoning, and therefore to be increasing the predictability of their legislation. In situations of low competitive intensity, some authors suggest that Delaware would be more interested in offering indeterminate and litigation-intensive laws, which would be more beneficial to that state's community of lawyers.¹²⁷ Hence, in the current situation, where Delaware has monopolised the supply side of the market, the other states have neither the knowledge nor the potential to make more predictable law, while Delaware lacks the incentives to make its legislation more predictable. In competition-intensive situations, states would be under pressure from each other to satisfy the needs of the demand side, which requires predictability to facilitate cross-border mobility and business.¹²⁸ Competing states would strive to offer predictable law, which would also be facilitated by emulating each other and learning from the legal cases they face. However, competition and legal development do not run smoothly hand-in-hand; political interference and interest comprise a force that must be taken into account in this discussion.¹²⁹

The situation in the EU is different.¹³⁰ Politically, Europe is more divided, and culturally and linguistically the differences are even greater than in the US. However, this does not mean that European companies do not consider the benefits of registering in one jurisdiction instead of another. For example, already in the 1840s French companies migrated first to England and later to Belgium to benefit from their better legal conditions.¹³¹ Since the 1840s, of course, the political landscape in Europe has changed. Countries have joined the European Union, which now plays the role of a supranational regulator. The EU aims at creating a single market, which should in principle be facilitated by legal certainty, mobility, and predictability. The creation of a single market has also

¹²⁶ Delaware has a well-established legal infrastructure specialised in company law, such as specialised courts, experienced lawyers, and an extensive body of case law. On the legal infrastructure supporting Delaware's position as a dominant venue for incorporation, see Charny (1991) 432; Kahan and Kamar (2002) 738.

¹²⁷ Charny (1991) 432.

¹²⁸ See also the results of the empirical research in Chapter 5.

¹²⁹ The last point is defended by scholars who consider competition for incorporation in the US a very weak process. Kahan and Kamar (2002) 748.

¹³⁰ Ringe (2013) 234-236; Braun (2013) 403-404.

¹³¹ Charny (1991) 428.

triggered a process of harmonisation in company law, with one implication being that any form of competition in the EU would disappear or would be further limited.¹³² However, waning competition and the emergence of harmonisation pose certain risks for the diversity of company law.¹³³ The defenders of harmonisation argue that a unified legal framework would encourage cross-border trade, and therefore further the creation of a single market. The opposers claim that harmonisation would destroy the diversity of legal solutions in the EU, and therefore suffocate the sources of innovation.

To conclude, the study of the competition of jurisdictions in company law is relatively developed in the US, and academic and practical debates derived from these studies can be useful in the study of the civil justice system competition. A first issue discussed was whether competition is over if one of the jurisdictions is dominating the market to the point of resembling a monopoly. The case of Delaware serves as an example. On this issue, the present study did not find a satisfying conclusion. It can simply be said that competition continues despite the fact that one of the jurisdictions seems to be a monopolist. The same might be expected for the civil justice system competition. A second issue discussed was the source(s) of direct and indirect benefits for competing jurisdictions. Alleged benefits from the competition of jurisdictions are direct profit from taxation and indirect profit from the incorporation-related taxation of businesses. It remains debatable whether these benefits are enough to justify entering into a competition with other states. Companies would benefit from competition in that they would have a better choice of rules addressing their needs. In many cases, managers have the final word in choosing a company's place of incorporation; therefore, legislation in the US tends to favour managers. While in the civil justice system competition there is no manager for litigants, lawyers are a force to be reckoned with. Section 4.3 takes on the task of analysing the relation between litigants and lawyers. A third issue discussed was the alleged race-to-the-bottom. However, this issue is analysed further in Section 2.4. A fourth issue discussed was the effects of competition on innovation and the predictability of law, and it was argued that competition promotes innovation. However, predictability is more relative to the interest of the parties able to influence the competing states. If these parties were interested in predictable law, competition would produce predictable law. A fifth and final issue discussed was the relation of regulatory competition and harmonisation. In the EU, the competition of jurisdictions for incorporation (also the civil justice system competition) coexists with the harmonisation process, although harmonised legislation could put an end to competition. The

¹³² The interaction between harmonisation and competition is elaborated further in Section 3.3.

This section presents some issues related mainly to harmonisation in company law.

¹³³ Zumbansen (2006) 543; Enriques and Gelter (2006) 419-422; Deakin (2000).

outcome of this coexistence is important both for competition and harmonisation. Section 3.3 provides a further analysis of the relation between competition and harmonisation, with special attention to the civil justice system competition.

2.3.2 Competition in tax law

Tax legislation is another field of law in which countries are considered to compete. The advantages and disadvantages derived from taxation are directly palpable for governments and private parties, thus making taxation a sensitive topic.¹³⁴ Governments perceive taxes as revenue, while taxpayers perceive them as an economic loss. To maintain an optimal level of taxation that can bring sufficient revenue to further political goals, and that can be considered an acceptable burden by tax payers, governments develop elaborated tax policies.¹³⁵ In doing so, governments take into account not only internal social, economic, and political factors but also international economic and political factors, thereby entering into a competition process that they cannot avoid.¹³⁶

Tax competition in modern scholarship is described as a *basic model* in which two countries of the same size share the same mobile tax base and have tax policies that are interdependent.¹³⁷ Tax revenues of one country depend on the tax level of another. For example, country A lowers taxes, and by doing so it attracts a large share of the mobile tax base to its jurisdiction; country B sees a large share of its mobile tax base migrate to country A, and consequently loses tax revenue.¹³⁸ This model leads to a race-to-the-bottom, where countries lower their taxes on foreign capital, thereby lowering the tax revenue of the other country. The other country will eventually respond by lowering its taxes until both countries reach a

¹³⁴ Dietsch (2014).

¹³⁵ Tiebout's theory is an attempt to better calculate the taxation level for public goods. See Section 2.1.4. See also Baskaran (2014) 5-7.

¹³⁶ It should be made clear that governments can decide to stay out of the regulatory competition in many fields of law, but in tax law they are largely unable to do so. If a government decides not to participate in the tax law competition, it has three possibilities: close up its economy in a (semi) total isolation (e.g. North Korea); delegate power to supranational organisations to enact tax policies; or not tax at all. Each of these options is possible, but few consider them feasible in practice. The majority of governments consider isolation economically unsustainable. The second option of giving up taxing authority to another supranational organisation is not politically possible (the case of the EU is a good example), while not taxing at all is more a utopian notion than a possibility. See Genschel and Schwarz (2011) 353.

¹³⁷ Genschel and Schwarz (2011) 353. For another definition, see Höijer (2008) 130. See also the definition of 'harmful tax competition'; Pinto (2002) 12.

¹³⁸ Before the 20th century, tax levels were relatively low, and cross-national tax levels were not high enough to entice mobile taxpayers. Interestingly enough, cross-border movement of capital was at that time easier. With the advent of the 20th century and the rise of the welfare state, the burden of tax was increased. At the same time, states began to restrict movement of labour and capital. For this, see Genschel and Schwarz (2011) 341; Kiss (2011) 642.

point of equilibrium, in which the tax level is lower than it would be in the absence of competition. This *model* is simplistic, but it has been expanded and developed with other variations. The first variation regards country size. In the basic model, countries are the same size, and therefore their tax incentives or disincentives are similar. If countries are of different sizes, their interests differ as well. Tax competition involving same-size countries is called *symmetric competition*; competition between countries of a dissimilar size is called *asymmetric competition*. Another variation in the basic model is the addition of *domestic constraints*. In the basic model, international tax competition dominates a country's internal tax policies; however, the addition of *domestic constraints* suggests that governments are subject to internal control and pressure from diverse interest groups. It can be argued that the last variation is also the most common.

The term 'tax competition' and similar terms are used to describe the above model. While the term tax competition bears strong economic connotations, it is also a legal term strongly connected to laws and legislation that create taxes, establish enforcement mechanisms, and regulate taxpayers' behaviour. Therefore, tax competition refers not only to an economic competition based on economic instruments but also to a legal competition. Scholars have identified four legal mechanisms used by governments to enforce and tax competitive policies: namely, reducing the statutory tax rate; narrowing the tax base; relaxing tax enforcement; and improving legislation governing national secrecy.

Reducing the statutory tax rate is held to be a better option than narrowing the tax base.¹³⁹ The first option is more visible and politically more retributive. Furthermore, it sends a concrete message to mobile capital that the level of taxes is being lowered.¹⁴⁰ Relaxing tax enforcement has been used by governments to ease the tax burden during certain periods. This policy is difficult to detect, but it might become a problem if tax law is harmonised in the EU, in the event of which some Member States would relax their tax enforcement in order to be more competitive. Another competitive policy that governments may further is the approval of additional legislation that defends secrecy. Generally, these laws favour tax evaders, and allow them to avoid the enforcement mechanisms in other states. The four policy options described here can be implemented by targeting specific types of taxes or specific groups of taxpayers.¹⁴¹

¹³⁹ Pinto (2002) 32, 41.

¹⁴⁰ Using tax reduction to attract investments; see Cookson (2004) 359.

¹⁴¹ Genschel and Schwarz (2011) 351-353.

Competition in tax law has its negative side. Certainly, governments do not like tax competition, as it drives tax rates down and therefore decreases revenue for the state budget. The race-to-the-bottom that ensues after competition is undesirable and unwelcome,¹⁴² and it is reflected as well in the race to secrecy. In certain circumstance, countries try to approve legislation that defends the secrecy of bank accounts, shareholders, or profit from shares.¹⁴³ However, while these moves might be welcome to shareholders, they are unwelcome to states that try to enforce their fiscal legislation, and that are interested in having information on the revenue of their subjects.

Secrecy relating to identity and information is so important that small countries have created a whole system aimed at attracting companies and individuals that want to keep their identities secret and to avoid taxation in their own jurisdiction.¹⁴⁴ These countries are known as tax havens, and, especially after the global financial crisis of 2008, are under heavy fire from the world's leading economies demanding that they reform their legislation. Already in 1998, the OECD had defined tax havens as countries that fulfil the following conditions: a) no or only nominal taxes; b) lack of effective exchange of information; c) lack of transparency; d) no substantial activities.¹⁴⁵ It is clear that the problem is not the low level of taxes in these countries – it is the combination of low taxes, lack of transparency, and collaboration between states.¹⁴⁶ Tax havens undercut the tax base of many countries, and therefore increase the tax burden of immobile factors as well as of mobile factors that do not or cannot migrate. As a response to this, states increase expenditures on the supervision and enforcement of their fiscal legislation.¹⁴⁷

Its negative image aside, scholars believe that tax competition helps to attract investments.¹⁴⁸ In fact, the tax rate is one of the factors that companies take into account when determining where to establish their seat or production site. Countries with a low level of taxation rates are able collect revenue resulting from

¹⁴² Genschel and Schwarz (2011) 343; Avi-Yonah (2004) 385, describes a-race-to-the bottom started by the US; Kiss (2012) 648; Littlewood (2004) 449.

¹⁴³ Genschel and Schwarz (2011) 345.

¹⁴⁴ Avi-Yonah (2004) 375-378; Genschel and Schwarz (2011) 349.

¹⁴⁵ OECD - Harmful Tax Competition Report: <<http://www.oecd.org/tax/transparency/44430243.pdf>> accessed on 22 December 2017.

¹⁴⁶ Slemrod and Wilson offer another point of view, showing how tax havens play a positive role in the economy. Despite their claim, however, it can be said that the lack of transparency and the provision of facilities for tax evasion is enough for tax havens to be considered negative elements. See Slemrod and Wilson (2009) 1262.

¹⁴⁷ Slemrod and Wilson (2009) 1269; Avi-Yonah (2004) 375.

¹⁴⁸ Avi-Yonah (2004) 377, 381.

an increase in economic circulation in their jurisdiction.¹⁴⁹ Another positive aspect is that tax competition helps prevent taxes being increased in an ‘abusive’ way, because a government knows that its mobile tax base will migrate to another jurisdiction.

Tax competition can also develop within the borders of a country. In this regard, two arrangements can emerge: vertical and horizontal. The first happens when a hierarchy of taxing authorities exists. The second happens when there are two or more co-equal taxing authorities.¹⁵⁰ In their law and economics analysis, Klick and Parisi (2005) concluded that tax authorities in the horizontal competition scenario would be better off if they colluded. This means that from the tax authorities’ perspective, competition should be avoided. A further implication is that harmonising solutions with respect to taxes and to tax rates would be more advantageous for the competing authorities than for the competition.¹⁵¹

The question of harmonisation¹⁵² of taxes has been popular in the EU since the Ruding Committee (Report of the committee of independent experts on company taxation 1992),¹⁵³ which proposed a minimum of 30% for corporate tax. Although the proposal was not accepted, the idea of harmonising tax law was planted.¹⁵⁴ The problem with harmonisation is that by giving up their tax authority, Member States would consider that they had lost a piece of their sovereignty,¹⁵⁵ which would result in political problems and reactions.¹⁵⁶

¹⁴⁹ Avi-Yonah proposes restricting tax competition among or from developing countries. In his opinion, this kind of competition is detrimental to their economies, and they would be better off without it. The reason is that large companies exploit the possibility of working in a tax-free – or few taxes – jurisdiction, but their profit goes outside the jurisdiction. Another reason is that because of few taxes, there are few resources to develop the country and to provide a well-educated workforce or to improve infrastructure. In contrast, Littlewood considers tax competition among developing countries to be a positive step to further their development. See Avi-Yonah (2004) and Littlewood (2004).

¹⁵⁰ Klick and Parisi (2005) 387.

¹⁵¹ Klick and Parisi (2005) 394.

¹⁵² In this regard, *harmonisation* means that taxes are set to a common intermediate level between the initial levels of taxes in two or more countries. Kotakorpi (2009) 141.

¹⁵³ Link to the report from the Archive of European Integration of the University of Pittsburgh: <<http://aei.pitt.edu/8702/>> accessed 22 December 2017.

¹⁵⁴ Kiss (2012) 641.

¹⁵⁵ Although this is a political problem, different scholars have considered economic problems as well as benefits resulting from tax harmonisation. As shown above, Klick and Parisi found that tax harmonisation makes horizontal competitors better off under certain assumptions. Kotakorpi (2009) considers that harmonising tax would have a negative impact on competition.

¹⁵⁶ Ring (2009) 559; Genschel, and Schwarz (2011) 355.

In conclusion, it can be said that governments are somehow obliged to engage in tax competition, the aim of which is to keep or to attract a large mobile tax base, with another goal being to attract investments or to prevent them leaving. Competition has resulted in a low level of taxes on a global scale. On the one hand, governments do not feel comfortable participating in a race-to-the-bottom, but on the other hand, they have to face this problem by competing with tax havens. While tax havens are a consequence of tax competition, they are considered unfair, and are criticised by other states. Harmonisation of taxes has been proposed to mitigate tax competition; however, while it would be beneficial to countries, it also faces political and sometimes economic censure.

Certain lessons related to the competition of civil justice systems can be drawn from the tax competition. Despite the general view that competition is beneficial, some competitions – like tax law – are not entirely advantageous. While taxpayers profit from low taxes, governments and public expenditures suffer from low revenue. Part of the civil justice system competition involves fees and taxes applied to suits and to other legal acts or procedures before a national court. However, whether countries compete by lowering these fees needs to be evaluated. Like competition in tax law, the civil justice system competition can produce rivalry between conflict resolution providers within the same jurisdiction: for example, the competition of some German courts for intellectual property litigation.¹⁵⁷ In the end, it can be expected that the civil justice system competition would be intertwined with many aspects of a country's political and economic activity. It is a matter of finding the right balance between the positive and the negative sides. Likewise for tax competition, it is hard to imagine any sound advice that would apply to all jurisdictions.

2.3.3 Competition of jurisdictions in labour law

Labour law is another area where competition between jurisdictions has been observed. Because labour is one of the main cost and production factors in a country's economic life, competition to have low labour costs is important for many economies. Competition in this regard is achieved not only by innovation or economic mechanisms but also by changing the legal bases upon which employment functions. This section provides a brief description of the competition of jurisdictions in labour by focusing mostly on the EU. Lessons derived from labour law can contribute to the study of the competition of civil justice systems, and will be described at the end of this section. Meanwhile, this section offers a historical introduction to competition in labour law, a theoretical overview, and a summary of the situation in the EU.

¹⁵⁷ Wagner (2013) 366; Stürner (2016) 146; Cremers and others (2016) 5-7.

Competition in labour law can be considered part of a greater process: namely, *competition in labour*. Since antiquity, countries have competed (i.e. waged wars) in having slaves or low-cost labourers to sustain their economic needs. And apart from the use of slavery in more recent times, things have not changed.¹⁵⁸ Economic agents try to find cheap labour, and they exploit it to save production costs. In this respect, competition in labour can be dissected into two parts: between companies and between jurisdictions.

Early examples of competition between companies show how aggressive it was in times of economic expansion.¹⁵⁹ In the 1920s, the US was experiencing a boom in car sales, and Detroit was the production powerhouse. Companies badly needed workers to fulfil customers' orders. One ploy was for company representatives to stand outside their competitor's factory and – using a megaphone – shout out promises of better working conditions. Workers would immediately throw down their tools and hurry over to the factory that was making the promises. Other companies repeatedly did the same thing. This was considered dangerous, however, and did not last long.¹⁶⁰ Nowadays, companies compete using other methods: for example, they try to combine lower labour costs with better-trained employees and advanced production technologies. Economic scholarship takes considerable care in discussing the way firms compete for labour and the implications it has for the economy. As regards this discussion, several point of interest can be isolated.

First, the labour market is not perfect, which means that at some point there are monopolies or oligopolies that apply market power to distort prices;¹⁶¹ second, employers have some influence in setting the wages of their employees;¹⁶² third, the labour market is characterised by product differentiation and imperfect

¹⁵⁸ Scholarship and the literature are of course concerned with the question of *modern slavery* as a way to exploit vulnerable groups of immigrants or citizens of underdeveloped countries. However, this is not part of the current topic, and will not be discussed further. For 'wage slavery' as a form of 'modern slavery', see Jenkins (2011) 190.

¹⁵⁹ Chalmers-Hunt (1903a, b) gives a detailed explanation of legal aspects related to the labour competition in the UK at the end of the 19th and beginning of the 20th century. This study is outdated, but gives an idea of the amount of thought that the academic world at the time gave to discussing labour competition.

¹⁶⁰ Welton (1923) 114. This does not mean that the early 20th century was a 'happy time' for workers; a good illustration of the precarious working conditions can be seen in Charlie Chaplin's acclaimed film *Modern Times*.

¹⁶¹ Sørensen (1994). Perfect competition is in line with the theories of classical economics; in contrast, heterodox economics does not use these terms. For more on this, see Section 2.2.

¹⁶² This is in line with the first point. In an imperfect market, one of the actors might have considerable power to influence prices. See Bhaskar, Manning, and To (2002), Manning (2003) 1. This is, however, in line with the heterodox concept of the market, where parties, despite being in competition or a monopoly, have some power to influence the price.

information; fourth, labour demand is heterogeneous;¹⁶³ and fifth, labour supply is not perfectly elastic.¹⁶⁴

The boundary within which firms can compete is set by law. Jurisdictions have in many cases an elaborate labour legislation enhanced by international conventions and court precedents that regulate labour conditions. Legal regulations set standards for working conditions that play an important role in attracting investment companies. Therefore, the competition of jurisdictions in labour law is focused on the level of standards offered to investors. From the point of view of employees, work standards are considered a benefit in addition to the wages. For example, paid holidays, a 40-hour working week, or travel reimbursements are considered additional revenue. From the standpoint of the employers, work standards are considered a tax on labour that is used to confer a public good. For example, paying employees who do not work for a long period or for only a short one increases the costs of production, but it produces a public good that in the long run might be beneficial to the company.¹⁶⁵

Charny distinguishes between four types of labour standards that are important in the competition of jurisdictions in labour law.¹⁶⁶ His categories are used to describe where and how countries might compete with each other. First, *static labour standards* confer a direct benefit on the employee in the firm in question, rather than creating a generic public good. With the introduction of these standards, workers might agree to work for a lower wage because they receive other benefits. A competition of jurisdictions within this set of standards is not feasible, as altering it would not offer any advantage. Second, *dynamic labour standards* are similar to the first ones but are – as the name says – dynamic. While static standards are acquired and can barely change, dynamic standards like minimum wage frequently can, and thus are able to offer a competitive advantage to jurisdictions. Third, *labour standards as social insurance* spreads risk among the workers as a group. These standards help workers to insure their group against future economic uncertainties. Employers pay a part of the wages to certain schemes, making them a burden that governments try to ease in their attempts to attract investors. Fourth, *labour standards designed to empower groups of*

¹⁶³ Bhaskar, Manning and To (2002) 155.

¹⁶⁴ This means that an increase in wages in one firm does not prompt all possible workers to go to that firm. Furthermore, a wage cut does not prompt all of that firm's workers to leave. This implies that the workforce is dependent not only on the wages but also on other elements such as distance from the workplace, hours of work, job specification, and social environment. See Bhaskar, Manning, and To (2002) 160, Manning (2003) 1.

¹⁶⁵ Charny (2000) 283. For theories against *standards as a tax on labour*, see Charny (2000) 287.

¹⁶⁶ Charny (2000).

workers aim at redistributing bargaining power between employers and employees. In general, it is considered that employees have little bargaining power compared to employers, and therefore governments encourage and defend the creation of trade unions, and increase the negotiating power of employees. Trade unions have a social function, and are often a sign of a country's healthy economy. From this perspective, they are considered by governments to be an important competitive factor.

In Europe, labour policies are considered important factors with regard to a country's competitiveness.¹⁶⁷ The promotion of employment and the improvement of living and working conditions are some objectives of the European Union and its Member States.¹⁶⁸ These objectives are achieved through legislative and court decisions, which aim at making the EU a common market with free movement of workers. The goal of all this legislation is to set minimum standards for working conditions that Member States will not be able to breach.¹⁶⁹ Apart from having a human face, these norms block the race-to-the-bottom of labour legislation. In fact, competition in labour law is believed to be immune to the race-to-the-bottom problem.¹⁷⁰ Nevertheless, labour law in the EU is not immune to other types of difficulties, one of which is *social dumping*.

Social dumping is a process whereby a developed country raises the living or working standards in such a way as to attract skilled workers and professionals from other jurisdictions. This means that unless that country's unskilled workers move away from this jurisdiction, they will remain unemployed. By the same token, jurisdictions unable to keep up with such an increase in standards will have a higher concentration of unskilled workers and a less qualified workforce.¹⁷¹ Bellavista (2006) explains that the EU should try to mitigate social dumping either through harmonisation or approximation of legislation.¹⁷² The tension in this

¹⁶⁷ For Bellavista, the asset of labour law in one jurisdiction does not influence in a decisive manner the decision of a firm to invest or not in that jurisdiction. This decision is influenced by many other factors. See Bellavista (2006) 5. Because this might be true, competitive factors should always be considered important, as their role might become decisive in several settings. The same can be said of labour law.

¹⁶⁸ Art. 151-153, The Treaty on the Functioning of the European Union, *Official Journal C* 326, 26/10/2012 P. 0001 – 0390.

¹⁶⁹ Bellavista (2006) 18.

¹⁷⁰ Charny (2002) 282.

¹⁷¹ Social dumping can sometimes be mistaken for the inability of a jurisdiction to adjust its economy in accordance with the requirements of the market. See Charny (2002) 287-288.

¹⁷² Bellavista (2006) 10-11.

regard is considerable, and the debate on harmonisation or approximation is heated.¹⁷³

To draw some parallel lines with the competition of civil justice systems, it can be said that EU Member States have created minimum standards in labour law that are an obstacle to the race-to-the-bottom. The question, however, is whether they can create a set of minimum standards in civil procedure to mitigate the risk of a race-to-the-bottom in the competition of civil justice systems. It can be argued that in the EU a minimum set of civil procedure standards exists, as guaranteed by the European Convention on Human Rights, and as elaborated by the European Court of Human Rights. In line with this, European legislation on private international law pays particular attention to the protection of weaker parties.¹⁷⁴ However, the competition in labour law bears the risk of social dumping. This does not seem to be the case for the competition of civil justice systems, however, as courts and cases do not migrate in the same way that workers do. Theoretically, competition in labour law can develop in four directions, and each has different characteristics and a different sensitivity. Such a distinction can be made as well in analysing the competition of civil justice systems and the way jurisdictions might consider responding to them. Competition can develop either by improvements in the court infrastructure, in the litigation procedures, or by a combination of both. Competition in labour law shows that single units exert little influence, which means that the possibility of influencing competition is concentrated in the hands of certain organisations. In the case of the civil justice system competition, lobby groups can be expected to have considerable sway.

2.3.4 Competition in contract law and environmental law

The above examples of company, tax, and labour law aptly demonstrate how competition between jurisdictions develops, as well as what some of its consequences are. However, examples of competition of jurisdictions can be found in other fields of law, and offer different perspectives on the dynamics of regulatory competition. This section scrutinises the competition of jurisdictions in environmental law and contract law, and submits some conclusions relating to these fields of research and the civil justice system competition.

To some extent, competition in contract law is difficult to tackle, largely because of the goal itself. An analysis of how countries try to compete in accordance with the laws applicable to a contract is a difficult undertaking, because those laws can

¹⁷³ Section 3.3 discusses the harmonisation and approximation dichotomy in the context of the civil justice system competition.

¹⁷⁴ Section 3.1 provides an analysis of the Brussels I (recast) Regulation, focusing on its role in the civil justice system competition.

be as diverse as the reasons for concluding a contract. In other words, because of the plurality of contracts, the applicable laws are diverse, and therefore the fields of law where they can compete are numerous. For example, a contract for the purchase of an immovable property and a contract for the purchase of a movable property have different applicable laws, and they are even more different if compared to a contract for the transportation of goods. Furthermore, business-to-business and business-to-customer contracts have different legal bases compared to each other or compared to the contracts concluded between individuals. This adds more complexity to the study of the competition in contract law. Moreover, an additional difficulty is the fact that different laws apply to different parts of a contract. Business-to-business contracts, for example, can reach extraordinary levels of complexity with different applicable laws for different parts of the contract. It can be argued that competition in contract law can focus only on the core part of the contractual transaction. This would mean discriminating between important parts of the contract, not to mention the difficulties in distinguishing between ‘core’ and ‘non-core’ parts. Given the aforementioned difficulties, any discussion about competition in contract law should be undertaken with caution.¹⁷⁵

Scholarship in this regard has been trying to construct a framework within which to analyse competition in contract law.¹⁷⁶ For example, Rühl (2010) analyses the legal framework that allows the choice of law in contracts in the EU, and concludes that it has several limitations. Nevertheless, it remains an important element for litigating parties.¹⁷⁷ Another study found that even though the choice of law and of court in a contract is important, lawyers do not act rationally and are often biased because of psychological preconditions.¹⁷⁸ Vogenauer (2013) goes into more detail in the analysis of choice of law and of court, and concludes that no competition exists in contract law.¹⁷⁹ On the demand side of the market, there are the contracting parties, who in many cases have asymmetric interests and different court preferences. Contracting parties possess varied levels of information and experience, which is limited but more abundant on the side of the most professional party. In view of the limited experience and information, parties in a contract choose the law most familiar to them, or that is neutral or linguistically accessible. If these criteria are not enough, the *perceived*

¹⁷⁵ Durand-Barthez (2012) accepts these difficulties in setting up a questionnaire that would investigate the governing law clause. This survey is discussed in Chapter 4.

¹⁷⁶ This part focuses on the situation in the EU. For empirical studies on the choice of contract law in the US, see Eisenberg and Miller (2009) 1475; Sanga (2013).

¹⁷⁷ Rühl (2010) 34.

¹⁷⁸ Durand-Barthez (2012) 510. For more on the process of choice and on some psychological implications, see Section 2.6.

¹⁷⁹ Vogenauer (2013).

sophistication, the fairness, and the accuracy of a law are taken into account.¹⁸⁰ Based on this description, the demand side does not seem to help competition or to behave in such a way as to force the supply side to compete. From this perspective, the supply side, which is composed mainly of states, does not have a strong incentive to enter into competition. In fact, the supply side does not compete at all.¹⁸¹

In conclusion, it can be said that competition in contract law faces certain methodological difficulties related to the delimitation of the research and the specification of the aim. Undertaking a study of the contract law competition bears the risk of it being submerged in a sea of legal scholarship. In view of this, such a study should be limited to a particular contract and within a specific region. Regardless of the methodological difficulties, scholarship has approached the issue of competition on contract law with interest. The major findings show that competition in contract law is a faint reality if it exists at all. The behaviour of both the supply and the demand side is not in keeping with that of a competitive market.¹⁸²

In contrast to the competition in contract law, the competition in environmental law is well studied. American scholars were the first to address it and to establish a framework based on law and economics. In this regard, environmental law is treated as a tax on companies or individuals who engage in exploiting the environment. In many instances, environmental law deals with externalities that do not have a proper market price, therefore it is difficult to measure the costs and benefits of its application.¹⁸³ In other words, it is difficult to determine what damage is done to the environment, and to what extent environmental law mitigates it. Nevertheless, subjects of the jurisdiction that enforces environmental legislation consider that it protects and enhances welfare. Hence, lowering environmental protection would be perceived as lowering the welfare of the population in general. Given that environmental protection can be seen as a tax

¹⁸⁰ Vogenauer (2013) 23. In this part, *perceived* is in italics to show that the parties rely on perceived knowledge, and have no strong evidence or research to support their choice. This is in line with what Durand-Barthez (2012) suggests – that psychological factors play a role in the choice of law.

¹⁸¹ Vogenauer (2012) 29. Despite this, some EU Member States consider that competition is beneficial and should receive political support. See Vogenauer (2012) 35.

¹⁸² Cuniberti (2014) offers a different view on the competition for contract law. Based on an empirical study conducted on data from the International Chamber of Commerce (ICC), Cuniberti concludes that there is a tendency to choose the law of England or of Switzerland as the law governing international contracts. He calls this competition between jurisdictions, with the English and the Swiss being the winners, and the others struggling behind.

¹⁸³ Swire (1996) 76.

involving companies, tax law competition can be used to draw parallels and conclusions with respect to environmental law.

One of the most widely discussed topics on the competition of jurisdictions in environmental law is the race-to-the-bottom.¹⁸⁴ In the EU, terms like ‘lowest common denominator’ or ‘regulatory meltdown’ have been used as well.¹⁸⁵ The term race-to-the-bottom has been criticised by some authors as being inappropriate and based on false assumptions.¹⁸⁶ In short, it can be said that the term offers only a mono-dimensional view of the process of jurisdictional competition, and does not represent the multi-faceted image of reality. Swire (1996) has suggested a more dynamic approach and terminology.¹⁸⁷

In conclusion, it can be said that regulatory competition is a process that has been studied in many fields of law. It was submitted above that contract law comprises provisions for several specific contracts. Therefore, the competition of jurisdictions in contract law would involve as many nuances as the number of types of contracts. This caveat can be applied as well to the competition of civil justice systems. In fact, many procedures and court competences are dependent on the type of case. If a jurisdiction is well known for its diligence in transport cases, parties signing a transport contract might choose to submit their claims to that court. The same parties might choose another court if the case in dispute involves intellectual property rights. Furthermore, some studies have shown that the choice of law is not based on rational criteria, and that psychological factors play a role. The significance of different factors in the choice of court is analysed in Section 5.3.

Mirroring the discourse on the competition of jurisdictions in environmental law, the consequences that affect the quality of law during the civil justice system competition can be better described by adopting a multi-dimensional perspective, in contrast to the bi-dimensional race-to-the-top vs. race-to-the-bottom view. More on this topic is discussed in Section 2.4.

2.3.5 Concluding remarks

This section provided an overview of the competition of jurisdictions in different fields of law. One of its aims was to draw lessons that can be applied to the competition of civil justice systems. Any analogy in this sense should be applied

¹⁸⁴ In this regards Holzinger and Sommerer, based on empirical data, conclude that regulatory competition in environmental law has produced a race-to-the-top in the EU. See Holzinger (2011).

¹⁸⁵ Charny (1991) 423.

¹⁸⁶ Swire and Revesz have both addressed the same issue in numerous articles, starting with Swire (1996) and Revesz (1992).

¹⁸⁷ Detailed in Section 2.4.

cautiously, as competition behaves differently in diverse fields of law, and thus produces varied consequences.¹⁸⁸ The fields chosen are those on which scholars have concentrated and produced more studies. This section offers a resumé of the findings stated above, which relate mostly to the competition of civil justice systems.

It should be noted that the competition of jurisdictions falls in the grey area that divides economics from law, making it a popular theme for law and economics scholars. As a consequence, many studies have been reduced to a cold calculation that tries to demonstrate the benefits, the side-effects, or the harm of competition, with legislation often treated as a burden that imposes costs on companies or individuals. Therefore, when countries relax their legislation, they ease the tax burden on users of law, and, consequently they lower the costs sustained by companies and individuals. While this might be acceptable for tax law, environmental law, or labour law, it cannot be true for the competition of civil justice systems. The fees paid by parties to courts are in many cases lower than the cost of the proceedings, and court fees are lower than other costs, especially lawyers' fees.

During the overview of the competition of jurisdictions for company law, part of the debate centred on the problem of evidence and its meaning. In other words, does the empirical evidence demonstrate a competition of jurisdictions for incorporations? This issue was raised by Vogenauer (2013)¹⁸⁹ with regard to regulatory competition in contract law. In the competition for tax law, it might be easy to spot competition by monitoring the level of taxes, but if applied to the competition of civil justice systems, the monitoring of court fees would show no result. Thus far, it can be said that empirical evidence is just one of the indications that might prove the existence of the competition of civil justice systems.¹⁹⁰

When addressing the competition of jurisdictions in the EU, scholars consider the consequences and problems encountered during a harmonisation process. In broad terms, harmonising means making laws similar to each other. While this would increase legal certainty in cross-border cases, it might smother competition. Furthermore, while harmonisation would increase the unity of the EU and its cross-border transactions, it would hinder the innovation process sparked by competition.

¹⁸⁸ Adams (2011) 229.

¹⁸⁹ Vogenauer (2013).

¹⁹⁰ The problem of assessing the existence of the competition of civil justice systems is addressed in Section 2.6.

For many scholars, the competition of jurisdictions raises a number of concerns regarding the race-to-the-bottom. While some dismiss the issue, others consider it a danger. A conceptual problem is that it offers a two-dimensional view of the situation. In other words, laws (legislation, legal situation) either improve or deteriorate. This view does not take into account other dimensions of law and legislation such as desirability or inducing efficiency. For these reasons, a perspective that takes into account other aspects is preferred.¹⁹¹

2.4 Competition of jurisdictions: consequences for the quality of law

One of the consequences of regulatory competition is its influence on the quality of law. It can be expected that competing jurisdictions change their legislation in the hope of making it more attractive to businesses or other consumers. These legislative changes affect the perceived quality of law in different ways. This section offers an overview of the discussion in this regard, and draws some conclusions in connection with the study of the competition of civil justice systems.

2.4.1 ‘Race-to-the-top’ vs. ‘race-to the-bottom,’ or race to somewhere else?

When discussing consequences for the quality of law during competition, the term most often used is race-to-the-bottom or its antonym race-to-the-top. Their meaning does not have a wide consensus, however, and many scholars apply their own working definition. In general, definitions vary from those that make the production of public goods the focus of their attention to those that use legal standards to measure the quality of law. In tax law competition, for example, a race-to-the-bottom occurs when one country lowers the provision of public goods, and taxes are too low relative to the optimal level, while race-to-the-top means that the provision of public goods is high and the taxes are set too high.¹⁹² Other definitions that take into account the quality of law rather than the provision of goods are more frequent. According to them, in a race-to-the-bottom, the quality of law changes because of competition, and that change is for the worse compared to the period before the competition started.¹⁹³ Two elements are important in this definition. The first is that the quality of law changes because of the competition activities or as a consequence of the competing process. This means that if the

¹⁹¹ The topic of race-to-the-bottom is addressed in Section 2.4.

¹⁹² Dhillon, Wooders, and Zissimos (2007) 391.

¹⁹³ The opposite happens during a race-to-the-top: i.e. the quality of law improves. For the definition, see Revesz (1992) 1210; Roe (2003) 595.

quality of law in a country decreases, but the country is neither participating in any competition nor is affected by it, this is not an indication of a race-to-the-bottom. The second element is that the quality of law decreases in relation to a specific point in time, which is the beginning of the competition process. This creates the problem of identifying the exact point in time when the competition started. Given that this is a difficult task, scholars in many cases select a time before the changes to the legislation under study had been implemented.

One important characteristic to be aware of during the race-to-the-bottom analysis is the fact that its meaning is subjective. When scholars describe the race-to-the-bottom, it is from the perspective of shareholders in company law, employees in labour law, the common population in environmental law, and the state in tax law.¹⁹⁴ The problem, however, is that if the law deteriorates for one of these groups, it improves for their counterparts, which in most cases are companies.¹⁹⁵ The question remains: Are companies what jurisdictions are trying to attract? If yes, then why is legislation that helps companies described as being in a race-to-the-bottom? The answer is that analyses adopt the perspective of the most vulnerable side, because in many cases this side has no bargaining power, bears the costs of the legal change, and does not profit from the change.¹⁹⁶ Companies, however, have more bargaining power, sometimes have strong lobbying possibilities, and in many cases the proportion of the profits is larger than the proportion of the costs.

What scholars emphasise is that a race-to-the-bottom or a race-to-the-top should not be taken *a priori*, meaning that competition and a race-to-the-bottom need not always be associated.¹⁹⁷ In fact, the race process needs analysis, but in many cases the evidence produced is inconclusive. Many scholars do not agree on whether a race-to-the-bottom or a race-to-the-top even exists in their fields of study.¹⁹⁸ The disagreement about the existence of a race-to-the-bottom are manifested in the confused debate regarding the consequences of such a race.¹⁹⁹ In tax law, this race implies that governments are lowering their taxes to suboptimal levels and losing

¹⁹⁴ On tax law, see Razin and Sadka (2012); Hoffmann and Runkel (2012); Kiss (2011); Genschel and Schwarz (2011); Ring (2009); Littlewood (2005); Avi-Yonah (2005). On company law, see Kamar (2006); Deakin (2006); Roe (2003); Bebchuk, Cohen, and Ferrell (2002). On labour law, see Bellavista (2009). On environmental law, see Fischel (2006).

¹⁹⁵ Only in company law are the observed parties the shareholders and the managers.

¹⁹⁶ Indirect profit is plausible but not taken into account.

¹⁹⁷ Dhillon, Wooders, and Zissimos (2007) 392.

¹⁹⁸ For tax law, see Kiss (2011) 641; Genschel and Schwarz (2011) 341; Ring (2009) 28; Dhillon, Wooders and Zissimos (2007) 395. For company law, see Kamar (2006) 1727; Deakin (2006) 451; Enriques and Gelter (2006) 453; Roe (2003) 591.

¹⁹⁹ Kahan and Kamar (2002) 742.

revenue, and are therefore unable to produce public goods.²⁰⁰ Other scholars posit that a race-to-the-bottom can be avoided if a Tiebout mechanism is functioning. In this case, the interaction between jurisdictions and populations would offer optimal results.²⁰¹ As well as affecting the quality of law, a race-to-the-bottom can produce negative social problems like social dumping and spillover(s).²⁰² Some scholars consider that a race-to-the-bottom, notwithstanding the negative consequences, would be beneficial because it could create a network effect between countries;²⁰³ others – apart from not believing in the race-to-the-bottom²⁰⁴ – consider that the bottom would never be touched, so either the term should be changed²⁰⁵ or it is not applicable in the first place. Other scholars have proposed changing the terminology from the two-dimensional race-to-the-bottom vs. race-to-the-top to something better and having more dimensions.²⁰⁶

The new terminology proposed by Swire (1996) erases the terms race-to-the-bottom and race-to-the-top in favour of ‘race to strictness-race to laxity’ and ‘race to desirability-race to undesirability’. The first category is descriptive, meaning that it describes whether laws become more permissive than before, while the second category has a normative character, describing whether the competition produces the desired effects. In some cases, legislation during competition can become stricter,²⁰⁷ but at the same time these effects would be undesirable. Important to note here is that this proposal does not change the elements implied in the race-to-the-bottom rationale. In other words, the quality of law changes because of competition, and a specific timepoint should be used to assess the consequences. Furthermore, all these ‘races’ should be judged from a specific perspective, which should always be that of the weaker party. Despite offering more dimensions and a different point of view regarding the race-to-the-bottom scenario, this proposal gained little favour and has seldom been used. This is undeserved, however, for two reasons: first, race-to-the-bottom and race-to-the-top are terms that – despite their popularity – generate more debate than results; second, Swire’s approach involves two dimensions that can better describe the consequences for the quality of law during competition.

²⁰⁰ Hoffman (2012) 2; Kiss (2011) 641; Ring (2009) 28; Littlewood (2005) 413.

²⁰¹ Razin and Sadka (2012) 165; Dhillon, Wooders, and Zissimos (2007) 419.

²⁰² Social dumping was described in 2.3.3; for more, see Bellavista (2006) 6. For spill-over and related problems, see Fischel (2006) 18 and Revesz (1992).

²⁰³ Bebchuk, Cohen, and Ferrell (2002) 1820.

²⁰⁴ Charny (1991) 437.

²⁰⁵ Charny (2000) 282.

²⁰⁶ Swire (1996) 70.

²⁰⁷ In the case of company law, strict secrecy laws can be an attractive incentive for companies.

2.4.2 How to brake in a race-to-the-bottom: observations

Leaving aside the new terminology suggested by Swire, a question arises: What can jurisdictions do in the event of a race-to-the-bottom? The answer is not simple. First of all, some jurisdictions do not realise that they are in a race-to-the-bottom,²⁰⁸ and they keep on going, with negative consequences. To a certain extent, this attitude prompts other jurisdictions to enter the race, thus providing more impetus. Second, jurisdictions find themselves in a Prisoner's Dilemma,²⁰⁹ and they would be better off collaborating with each other rather than competing.²¹⁰ When jurisdictions compete, their behaviour escalates and their legal framework deteriorates. If they were to collaborate, jurisdictions would determine a common strategy that would hinder the downward spiral. Critics of the Prisoner's Dilemma point out that jurisdictions could reach an agreement to avoid suboptimal levels of legislation. Such an agreement would take the form of a treaty and a cross-border agreement between countries to maintain a certain quality of law in all the jurisdictions. Third, it is hard to measure the quality of legislation and the benefits derived from it, which makes it difficult to develop and implement policies.

A proposed solution to the race-to-the-bottom problem involves the intervention of a supra-jurisdictional legislator. A classic example of this is the US environmental legislation,²¹¹ which the federal government took into its hands to foil the attempts by some states to use low environmental legislation to attract investors. In the EU, a possible way to stop a potential race-to-the-bottom is to harmonise a particular field of law, or to establish a minimum level of legal standards.²¹² Minimum standards have been applied in human rights law since the creation of the European Convention of Human Rights, which in itself embodies the minimum standards that contracting parties cannot breach. The EU in this way should play the role of arbiter for competing countries, and protect standards that

²⁰⁸ Littlewood (2005) 453.

²⁰⁹ Revesz (1992) 1217; Avi-Yonah (2005) 385-386; Hoffmann and Runkel (2012) 3. For a sceptical approach to the possibility of a Prisoner's Dilemma in the competition of jurisdictions, see Littlewood (2005) 453; and for more detailed analysis, see Swire (1996) 88-93.

²¹⁰ Revesz (1992) 1217, describes the Prisoner's Dilemma as a situation in which '...two individuals, who are factually guilty of a felony, are taken into custody separately and interrogated by a prosecutor who seeks to get them to confess. If neither confesses, the prosecutor can obtain only misdemeanour convictions that would result in sentences of one year for each individual. If only one confesses, the prosecutor is willing to offer that individual a plea bargain that would lead to a six-month sentence; the prosecutor can then obtain a felony conviction and a ten-year sentence for the other. If both confess, they will each get convicted of a felony but will receive a sentence of five years'.

²¹¹ Fischel (2006) 17.

²¹² Deakin (2006) 443; Bellavista (2006) 18, 24; Roe (2003) 642.

must not be violated.²¹³ The problem with harmonisation is that it terminates not only a race-to-the-bottom but it does away with competition as well.²¹⁴ This is why scholars more often use terms like ‘*minimum level of social standards*’, ‘*parameters that allow Member States to refer to*’, and ‘*protection of standards*’.²¹⁵ Therefore, if competition is desired, even harmonisation should be undertaken with caution.

In terms of a possible race-to-the-bottom in the competition of civil justice systems, it is wise to tread carefully in order to better understand the process.²¹⁶ First, it should be established whether a particular jurisdiction is in fact competing. Second, it should be established whether the quality of law is decreasing in comparison to its level at a particular previous point in time. This can be the time at which the jurisdiction decided to take part in the competition, or when the last major legislative changes were made. Third, it should be established which is the weaker party whose standpoint should be taken to evaluate the race-to-the-bottom. In the competition of civil justice systems, however, it is difficult to determine which is the weaker side. In general, individuals and small enterprises are weaker, but in other cases, it can be argued that the defender is the weaker party; nevertheless, this is still relative. As in company or environmental law, the debate in this regard is inconclusive.

Nevertheless, this does not mean that the competition of civil justice systems in the EU is immune to a race-to-the-bottom. In fact, the EU as a supranational legislator should assume the role of arbiter, and take measures to stop a race-to-the-bottom before it begins. It is understandable that harmonisation and the creation of minimal standards in procedural law are difficult, and resistance is fierce, but taking slow preparatory steps is better than waiting passively for the storm to arrive.

²¹³ Roe in his analysis suggests that states in the US compete as much as allowed by the federal government. This means that government standards hinder the race-to-the-bottom and the race-to-the-top indiscriminately. Furthermore, states can compete only if the federal government allows them to. Following on from Roe and then Swire, it can be argued that the federal government would try to keep the states on a ‘leash’ in a race to laxity or strictness as well as in a race to desirability or undesirability. For more on Roe’s argument, see Roe (2003) 637.

²¹⁴ The harmonisation process is discussed further in Chapter 3.

²¹⁵ See footnote 212.

²¹⁶ Vogenauer claims there is no race-to-the-bottom. See Vogenauer (2013) 75.

2.5 The choice making process

Competition involving jurisdictions occurs not only because the government desires it but also because individuals and companies are able to express their will by making choices. This process is of vital importance, and policy makers should pay closer attention to it. Studies having a legal or an economic background tend to have a rational approach to the process of choice making. They consider the decision maker to be as rational as *homo economicus*, a being that is capable of always making the best decision, thereby reducing choice making to a formula of static factors. This conceptualisation is also reflected in empirical studies of jurisdictional competition, where researchers try to find factors that influence a rational choice maker. Commenting on the results of empirical research that he co-conducted, Durand-Barthez (2015) concluded that in many cases the choice of jurisdiction is influenced by psychological factors rather than being the result of rational thinking.²¹⁷ Given that these factors play a significant role in the choice making process, this section offers a brief description of related findings.

2.5.1 Choice preferences and choice categories

As regards choice, almost the first thought is to consider it a rational process, meaning that an individual using his free arbiter can decide upon a given issue. Choice rationality means that individuals see the issue clearly, they have complete information about the cost and benefits of each option, and they compare the options in a single scale,²¹⁸ after which they make a choice in order to maximise their preferences. The origin of the preferences is considered exogenous.²¹⁹ Thus, an important element in the choice making process is preference, which can be conscious or unconscious. Conscious preferences reflect the needs and objectives of the choice maker, while unconscious preferences reflect his prejudices and biases. For example, a litigant seeking a court has certain needs and objectives to which certain preferences correspond. If the litigant wants to delay the process, he will prefer a slow court. If the litigant wants to lower the costs, he will prefer a low-fee court and other similar characteristics. Unconscious biases are, for example, a preference for a certain country, for a certain type of person, or for a certain kind of culture; they are not recognised, but play a role in the decision making process. It is suggested that individuals categorise preferences based on

²¹⁷ Durand-Barthez (2012) 505, 510.

²¹⁸ Meaning that the value of every issue, problem, or question can be translated into a single denominator or measuring unit, and thereby become comparable.

²¹⁹ As Schwartz explains it, "...preferences are frequently described as exogenous to the model of rational choice, meaning both that the model has nothing to say about them and that whatever the story on the origins of preferences may turn out to be, the power and validity of the model will be unaffected by it." See Schwartz (2000) 81.

their needs and possibilities,²²⁰ meaning that they create categories in their mind, and while determining their preferences, they tend to calculate how much they will gain in each of these categories. For example, let us say that a litigant wants to save costs, but at the same time wants to delay litigation. This person's preferences will land on the elements that satisfy both categories. The problem with categories is that they are not equal; in fact one category can have a weight that far outweighs the others. In the above example, one of the categories is more important for the litigant, which means that the preferences for this category will take precedence over the others. At this point, it is important to understand how categories come into being. Some are created as a result of habit, cultural norms, and tradition.²²¹ It can be expected that when litigants and lawyers make a choice, they take into account certain categories of needs and their corresponding preferences. Some individuals have clear knowledge of the above-mentioned categories, and try to avoid these by being influenced only by other factors such as market trend or fashion. The literature that criticises rational choice theory is abundant,²²² with critics claiming that it is extremely difficult to fulfil all the requirements of the 'rational' definition. However, it should be remembered that in the present research, the term rational choice is also used to point out the importance of preferences and categories.

Despite varied criticism of the rational choice theory, preference and categories hold as essential elements during the choice making process. Even *irrational* choice makers use preferences and create categories. As shown in this section, individuals who choose the court should be investigated beyond the jurisdiction they select. Their preferences and choice categories should be explored in depth for a clearer understanding of how the demand side of the civil justice system competition behaves.

2.5.2 Choice seen as provoking anxiety and blocking decision making

In some modern societies, individuals are vested with the idea that they have immense freedom, and are entitled to a lifetime of pleasure and happiness. Constant marketing and media displays bombard people with the notion that they are masters of their own life, with endless choices at their disposal. A person might almost see his life as being a piece of art that can be shaped and moulded according to his will.²²³ Paradoxically, this notion increases insecurity and anxiety

²²⁰ Schwartz (2000) 82.

²²¹ Schwartz (2000) 82-83.

²²² Schwartz (2002) 1178; Salecl (2009) 178.

²²³ Salecl (2009) 158-161; Salecl (2010) 10-13.

during choice making.²²⁴ In fact, in modern times, individuals are supposed by society to possess all the information necessary to make an appropriate decision. When the time comes, however, this supposition creates an anxiety that translates into a feeling of inadequacy and uncertainty. The individual may feel lacking in knowledge, and so turns to authorities²²⁵ in search of relevant information, but then constantly doubts the authority. The anxiety is also increased in terms of the image that the individual wants to project. Choice making is not an individual process,²²⁶ but one in which the person takes into account how his actions will be perceived by others. The opinion of others is another anxiety factor during the choice making process.²²⁷

In addition to this behaviour during the choice making process, the perceived freedom to choose is sometimes masked by what is referred to as *forced choice*, which can best be illustrated by the famous gag question ‘your money or your life’. Here the robber appears to be offering the victim a choice, but in fact he is offering only a single possibility, and sometimes not even that. In some cases, people that have to make a forced choice can experience severe instances of neurosis.²²⁸

The reason that making a choice induces anxiety is because choosing one thing means losing another.²²⁹ When a person makes a choice, he loses the possibility or chance of following the other option. People in modern societies respond to this anxiety by trying not to make any choice at all, which may even – at a basic level – partly explain why some restaurants offer limited menus. If customers are confronted with an extensive menu, they become anxious, and often regret the choice they eventually make. Many books and advice columns are published daily with the sole purpose of helping individuals develop strategies to limit their choices.²³⁰ This is a strange but obvious response to the anxiety induced by the need to make a choice. Regardless of how much anxiety a choice entails, however, it is an important element in furthering progress and in societal and scientific research.

Decision makers face great difficulties when confronted with multiple options, and this can result in a choice overload. In other words, too great a choice can be

²²⁴ Salecl (2010) 12; Marcus and Schwartz (2010) 348.

²²⁵ Authorities can be books, magazines, the internet, a dictionary, another person, and so on.

²²⁶ In many instances, choice is considered an individual choice. For example, the colour of a shirt is a matter of personal choice, but, as explained in the text, it is not simply that.

²²⁷ Salecl (2009) 165.

²²⁸ Salecl (2009) 173.

²²⁹ Schwartz (2004) 72.

²³⁰ Schwartz (2000) 86.

challenging. Experiments have shown that when people in a supermarket have a choice of only six varieties of jam, they are more prone to choose and buy one of them, compared to if there are thirty varieties.²³¹ Apart from resulting in people buying less jam, choice overload can lead to production paralysis, poor decision making, and dissatisfaction with good decisions. In other words, even though choice is related to freedom, too much choice may restrict that freedom.

2.5.3 Maximisers or satisficers?

As explained earlier, the possibility of choosing does not mean that a person will be happier. Anxiety looms over choice makers. Furthermore, choice is not fully rational, but is influenced by other elements. It is also true that not everyone behaves in the same way during the choice making process. In fact, individuals can be divided into Maximisers and Satisficers.²³² Maximisers²³³ always want the best, and are not happy with a second-best alternative. Satisficers, however, can also accept good-enough options. As regards choice, this has several implications. In comparison to Satisficers, Maximisers tend to spend more time and effort in making their choice. This means that the choice made by the Maximiser is more costly than that made by a Satisficer. Furthermore, after the choice has been made, there is a high probability that Maximisers will find an option that is better than the one they had just chosen, which will cause them to regret their choice. Maximisers are more prone to be quickly dissatisfied with the choice they make. In fact, during the choice making process, while they are investigating and evaluating several options, they start building expectations. The risk is that these expectations can exceed the perceived satisfaction, and therefore make the choice appear less satisfactory if satisfactory at all. The consequences are even worse when a Maximiser cannot determine the best option, as Maximisers tend to be less adaptive to options and to become frustrated. In the end, being plagued by so many problems related to choice increases the possibility of Maximisers falling into depression.

Lawyers are constantly expected to perform well or to over-perform. Requests from their clients and their superiors exert considerable pressure on them to make impeccable decisions. An environment that behaves like a maximising choice maker emerges, which pushes lawyers towards the same previously mentioned constraints. In this environment, lawyers will refrain from making risky decisions, and will adapt less to the changing environment, which has a negative impact on the civil justice system competition. Lawyers would be reluctant to choose a

²³¹ Schwartz (2000) 86.

²³² This part is based on Schwartz (2004).

²³³ Schwartz has created a scale to categorise Maximisers. Maximisers are those that score 4 or higher on the scale, which is a set of 14 questions. For more, see Schwartz (2004) 72.

jurisdiction that has not been tested, fearing that they were not making the best choice as Maximisers. The Maximiser and Satisficer dichotomy has considerable potential to influence lawyers in determining their choice of court. It is suggested that dedicated studies be conducted to examine more thoroughly how this condition affects lawyers.

2.5.4 Making a choice and choosing a court

Making a choice is an internal human process that manifests in the outside world as a decision. No matter how formal the decision, the internal process is loaded with some of the aforementioned psychological characteristics. As a result, even the choosing of a court should be considered in the light of psychological processes that influence human behaviour. One of these factors is the creation of categories of needs to which a different set of preferences correspond. However, because decision makers create many categories and have many preferences, they also face more decision options. Research has shown that a plurality of choice options induces anxiety that in turn prevents decision makers from making an appropriate choice. This is even more pronounced for Maximisers, who often regret or are dissatisfied with their choice. Lawyers and their working environment tend to be Maximisers, and the combination of these factors creates a choice overload.²³⁴ This means that choice makers either face psychological difficulties in making a choice or they are not able to make a decision at all. To overcome this, choice makers resort to reducing choice alternatives.

In the choice of court process, lawyers often have the possibility of choosing between more than two options. In addition to the information barriers, choice overload and other psychological factors can prevent lawyers from considering certain jurisdictions. This of course is to the detriment of the regulatory competition in general and to the civil justice system competition in particular. Thus far, empirical studies have not rigorously tackled the problem of psychological influences. Durand-Barthez (2012) is one of the few researchers to acknowledge that psychological factors play a role during the choice of law process. Therefore, it is important that theoretical studies examine choice making as a psychological process. Empirical research is also needed to provide data on theoretical advances, as well as to determine possible missing elements.

²³⁴ Low (2013); Posner (2013).

2.6 Assessment steps for the competition of civil justice systems

The regulatory competition can be studied and described from many different viewpoints. Arguably, diverse mechanisms and perspectives can be used to measure competition. Often a point of contention is not so much the existence of competition but its intensity, and intensity is important with regard to the expected results of the competition. Because the behaviour of parties involved in competition is affected not only by the existence of competition but also by its intensity, this section proposes a mechanism to assess that intensity. First, the mechanism is described, and then observations and examples are presented.

Studies on the competition of jurisdictions are in some cases inconclusive, with the ongoing debate on company, tax, environmental, and labour law being a good example. In company law, for instance, scholars still argue whether competition is an ongoing process or a phenomenon of the past.²³⁵ The same discussion also recurs in other fields of law, including the competition of civil justice systems. These examples demonstrate that providing a clear-cut answer is difficult, and sometimes not truly in line with reality. A better approach would be to give grades to the process of competition, in the same way that hotels or restaurants receive stars or grades for their quality. In other words, it would be beneficial for the study of regulatory competition to introduce a benchmark, a grade system, or an assessment mechanism to determine its intensity.

In this section, a three-step mechanism that measures the intensity of a competition of jurisdictions is proposed. Two of these steps are qualifying conditions, meaning that without them a process cannot be qualified as competition, while the remaining step is complementary or qualitative, meaning a condition that can assess the intensity of competition. If a supposed competition process does not fulfil the qualifying conditions, it means there can be no talk of a competition process. If the process reaches the score of zero, it means there is no competition. If the maximum score is reached, the process under study is a ‘pure competition’ as assessed by the mechanism. *Pure competition* means that the process measured has reached the maximum score for this scale.

2.6.1 Assessing the intensity of the competition of jurisdictions

To begin with, let us assume that the degree of the competition between jurisdictions in a given legal field is $F(c)$.

²³⁵ Described in Section 2.3.1.

- I. The first step is a qualifying one. From among a predefined number of potential jurisdictions, it measures the ratio of countries that are active in the competition.

Studies on the competition consider a pool of jurisdictions to be potentially equal to compete. For example, when the competition of jurisdictions in the US is studied, all the states are considered to be equally interested in it; the same can be true when the competition of jurisdictions in the EU is examined. These countries are considered potential competitors but without any proof of their interest in competing. A priori, they are presumed to be potentially interested in competition for the sake of the study and not on the basis of their merits. At this point, let us assume the potential jurisdictions to be n_p . It is clear that the value of n_p cannot be zero, otherwise it makes no sense to study competition if there is no group of jurisdictions to be studied. From this set, only some of the jurisdictions will show signs of interest in competition and be willing to take part in it; the others will remain uninterested and nonreactive. Let the jurisdictions that demonstrate some form of interest or activity be n_a . The problem might be how to detect this interest. In general, it could stream from the government and be expressed in any possible form. In its purest form, this interest is expressed through political and/or legislative actions. For this step, every form of expressed interest in the competition of jurisdictions should be counted as valid, and the jurisdiction that expresses is counted as n_a . The value of n_a can be zero or one, which means that there is no country that shows interest in competing, and therefore there is no competition. Measuring the ratio between n_p and n_a would give a value to the interest of the jurisdictions in the competition process. The nearer the ratio is to one, the more jurisdictions are interested in competition, and the more intense the competition is expected to be. The nearer the ratio is to zero, the weaker the competition. Based on this, the value of $F(c)$ in relation to n_p and n_a would be $F(c) = f(\frac{n_a}{n_p})$. As previously mentioned, it is obvious that n_p cannot be zero, otherwise the function is not valid, while in real life it means that it makes no sense to speak of competition, because there is no potential for it. While if n_a is zero, the value of $F(c)$ would be zero, meaning that there is no competition. In an extreme case when n_p and n_a are equal, $F(c)$ would be one, meaning a very intense competition.

- II. The second step is a quantitative one. It measures the actions taken by jurisdictions in the process of competition. The actions can be political and/or legislative.

As mentioned in Step I, jurisdictions can take political or/and legislative actions as competition activities. Political activity should be considered any form of

official debate to promote the benefits as well as the positive aspects of a jurisdiction, in addition to policy drafting and implementation actions that promote competition. Furthermore, actions carried out or supported by the government or one of its agencies should be considered political activities. Let these activities be π , which measures all the actions taken by all the jurisdictions together, and not only the actions taken by a single jurisdiction. For example, π can be expressed as $\pi^{Fr} + \pi^{US} + \pi^{Ger} + \pi^{It} = \pi$, where π^{Fr} , π^{US} , π^{Ger} , π^{It} are political activities in France, United States, Germany, and Italy.

As well as political activities, competing jurisdictions can engage in legislative activities, which would change a jurisdiction's legislative package and offer new competitive products to businesses and individuals. 'Consumers' of the law need not only political rhetoric but legislative actions as well. Legislative activity would be considered any change, amendment, or approval of law in the legislative field where the jurisdiction is competing in order to give the country a comparative advantage. Moreover, changes in by-laws, regulations, procedures, directives, and other legislation should also be counted as legislative activity. In contrast, legislative proposals should be considered political rather than legislative actions. Let the political activities be φ .

The sum of political and legislative actions would be $\pi + \varphi$, where $\pi, \varphi \in N$. There are two difficulties in calculating this step, of which the first is how to count activities. Would many activities related to each other count as one? Would a single activity be dissected into small components? If a liberal counting approach is taken, the value of π and φ might be higher than the actual situation. The counting from two different persons can give different results. Furthermore, it might be difficult to distinguish between a political and a legislative activity. Legislative activities are sometimes preceded by political activities, which for one person might be considered a single activity, while for another it might be more than one. Therefore, it is useful to introduce an arbitrary cap of ten to the value that π and φ can reach.²³⁶ This has two benefits. First, it makes a distinction between a process that has one legislative or political activity and a process that has two or three or more. Beyond ten activities, two processes should be considered equally competitive, at least as regards this step. Second, by introducing a cap of ten, the importance of this step remains limited and does not overshadow the others. With reference to the previously mentioned difficulties, the second one is in establishing a timeframe from which to begin counting the activities. This can be resolved by measuring when countries began to show interest in the competition process. An obstacle to this can be the fact that

²³⁶ The limit of ten is arbitrary, but allows ($\pi + \varphi$) to take nearly twenty values and therefore have considerable influence on the value of the intensity.

jurisdictions are not synchronised in their competitive interest. Therefore, two jurisdictions might have a difference of ten or more years as regards expressing their interest. This problem can be resolved by establishing a timeframe and counting activities only within this period. In conclusion, the degree of the competition in relation to the first two steps is $F(c) = \frac{n_a}{n_p}(\pi + \varphi)$, where $\pi \leq 10$ and $\varphi \leq 10$.

- III. The third step is a qualitative one. The competition of jurisdictions is composed not only of some jurisdictions that offer their legislation or legal environment but also of consumers that take up their offers. These consumers comprise the demand part. This step serves to establish the presence and the magnitude of the demand side in a competition process.

If two or more parties compete, they need to know which one has an advantage and the nature of its most appreciated element. In other words, they need feedback on their competitive behaviour. In the competition of jurisdictions, the feedback is provided by legal consumers that use the legislation on offer. Calculating this step is similar to the process in the first step. First, the set of target legal consumers (l_t) should be established. It can be argued that the whole population of n_p and even more can be considered as l_t . But when n_p think of entering into competition, their target legal consumers are not all the companies and individuals in their areas.²³⁷ Their target is only a limited number of consumers, which most often are associated with big companies. Therefore, l_t should be studied carefully and established, and not be presumed to be $l_p = l_t$. The number of the target legal consumers is not enough to give a meaning to the formula; as with the first step, it should be related to the number of actual legal consumers l_a . Legal consumers do not only express their interest in the competition of jurisdictions – they also choose one of the jurisdictions based on certain rational criteria. There are two important elements in this step: the choice process and the rationale behind the choice. The first requires the legal consumer to pick one or two of the offers and to use them. If he does not make a choice and the choice is forced upon him, or if he fails to do it, this means that the choice does not take into account any of the offers, and therefore does not contribute to the competition.²³⁸ The second element is rational choice. If the legal consumer chooses not because there is a rational reasoning but because of tradition or routine or some other ingrained behaviour, he fails to deliver a message to the competing parties. This kind of legal consumer

²³⁷ The total number of potential legal customers can be represented by l_p , where $l_p > l_t$.

²³⁸ Imposed or forced choices should not be considered choices at all. Therefore, the number of legal consumers that make forced choices should be discounted.

does not take into account any of the advantages or disadvantages of the parties. Therefore, these two elements need to be present in order for a legal consumer to qualify as l_a .

The magnitude of the demand side can be expressed as the ratio between l_a and l_t . It is obvious that l_t cannot be zero, because there is no competition without a target group of customers, as the function is not valid. However, l_a can be zero, which means that there is no competition, because there is no demand side and the value of the function is zero. Combining the three steps, the formula for the intensity of competition can be expressed as $F(c) = \frac{n_a}{n_p} (\pi + \varphi) \frac{l_a}{l_t}$, where $\pi \leq 10$ and $\varphi \leq 10$.

2.6.2 Hypothetical case studies

Let us consider some hypothetical cases of competition and examine the outcome of the assessment mechanism.

Case 1: In a particular field of law, twenty-eight jurisdictions can potentially compete to attract legal-consumers ($n_p = 28$). Only six of twenty-eight jurisdictions are competing ($n_a = 6$). These jurisdictions have engaged in some political and legal activities to compete ($\pi + \varphi = 12$). From a survey of two hundred lawyers ($l_t = 200$), forty of them responded that they choose rationally between one of the competing jurisdictions because of a competitive advantage it offers ($l_a = 40$). From these data, it can be calculated that the intensity of competition in this case is $F(c) = 0,5142$. This score is very low if compared to the maximum of twenty that the assessment can reach. The reason for this is the relatively small proportion of jurisdictions that take part in the competition, along with the small proportion of legal consumers that are interested in it.

Case 2: In a particular field of law, four jurisdictions can potentially compete to attract legal consumers ($n_p = 4$). Only three of four jurisdictions are competing ($n_a = 3$). These jurisdictions have engaged in some political and legal activities to compete ($\pi + \varphi = 6$). From a survey of forty lawyers ($l_t = 40$), thirty-nine responded that they choose rationally between one of the competing jurisdictions because of a competitive advantage it offers ($l_a = 39$). From these data, it can be calculated that the intensity of competition in this case is $F(c) = 4,3875$. This score remains low because of the limited amount of political and legislative activity on the part of the competing jurisdictions. As mentioned earlier, legislative and political activities are important in demonstrating the interest of the jurisdictions, and in showing that they are trying to change and to offer different and new attractive solutions to legal consumers.

Case 3: In a particular field of law, fifty jurisdictions can potentially compete to attract legal consumers ($n_p = 50$). Only two of fifty jurisdictions are competing ($n_a = 2$). These jurisdictions have engaged in some political and legal activities to compete ($\pi + \varphi = 20$). From a survey of six hundred lawyers ($l_t = 600$), five hundred and fifty responded that they choose rationally between one of the competing jurisdictions because of a competitive advantage it offers ($l_a = 550$). From these data, it can be calculated that the intensity of competition in this case is $F(c) = 0,7333$. The score is very low because of the limited number of jurisdictions that take part in this competition despite the large number of legal consumers that are interested and the large number of political and legislative activities observed.

On the basis of these hypothetical cases, it should be said that a high-intensity competition is one that achieves a high score in all the components. It can also be said that competition is not a process that can be carried out from only one side (offer-demand) – it needs both – and furthermore, it needs real engagement from jurisdictions to create a political and legislative stimulus in order to be attractive and to compete with other jurisdictions.

2.6.3 Comments on the assessment mechanism

The assessment mechanism is intended to be used along the lines of empirical research because it can give a value to the intensity of regulatory competition. In many cases, empirical studies produce figures without taking a good comprehensive look at their magnitude and gravity. Using data derived from empirical research, applying the assessment mechanism would at least give an idea of the competition's intensity. Measuring the intensity, however, is not the same as measuring the quality, which is a topic that requires a different approach, including a careful inspection of the policies employed. Furthermore, the mechanism is unable say anything about a possible race-to-the-bottom or a race-to-the-top, or about laxity, strictness, or anything else. Another limitation is related to the quality of the sources it is using. If these are not trustworthy, or they do not provide figures to express the variables of the formula, the results of the assessment mechanism will be weak or not useful at all.

Parties interested in competing can apply the results of the mechanism to evaluate their possibilities. A low assessment score means that the intensity is low, and therefore – in comparison to a high score – there is more space for competitors. The lowest score that the assessment can yield is zero, which means there is no competition to speak of. The highest possible score is twenty, which means full-intensity competition. The higher the score, the higher the intensity of competition, and therefore the more difficult to compete or to enter the competition.

It must be said that the assessment mechanism does not measure the extent of the competition, as this measurement can be derived only from surveys or empirical studies. In this sense, the extent would be described by the size of firms in a market. The larger the size, the smaller the competition.²³⁹

2.7 Conclusions

The aim of this chapter was to provide an overview of certain topics that recur in the studies on regulatory competition, and are important for the research on civil justice systems.

On competition

Section 2.1 showed that a competition of jurisdictions has long been observed. However, competition earned its prominence in economics thanks to the work of Adam Smith (1776), who argued that, if left alone, competing self-interested individuals would produce more wealth and benefits for society compared to a society constrained by restrictions. Since Smith, competition has undergone various types of scrutiny, although it is generally agreed that it confers benefits on individuals and society alike. Among the benefits is its ability to promote an efficient allocation of resources. Efficiency also affects the use of human resources and innovation in production and products. Competition, however, is vulnerable to market distortions such as monopoly, oligopoly, and oligopsony. Governments or market regulators should be careful to investigate market distortions and to help competition remain 'healthy'.

Competition is also credited with the accumulation of knowledge and social norms. Hayek (1948) was one of the promoters of this idea, according to which competing units tend to create a social order with efficient rules that change according to changing needs, while interacting and competing parties create a process of discovery whereby they try to overtake other competitors. The discovery process creates a process of knowledge accumulation that is important for social development.

²³⁹ This is measured by the Herfindahl Index (often referred to as the Herfindahl-Hirschman Index), which measures the concentration of firms in an industry. As mentioned, the higher the Herfindahl Index the lower the competitiveness of the market in a given industry. Measuring the Herfindahl Index requires considerable data and which are difficult to collect. For the civil justice systems, in particular, it requires court data from all the Member States about the number of cross-border commercial cases in order to establish the market share of each Member State so that the concentration in this particular industry can be assessed, and therefore the competitiveness of this market. If data are available, it would be interesting to see in the future researchers that use the Herfindahl Index in the study of regulatory competition. Besanko (2013) 171-172, Baker (2010) 238.

Several theories have been developed, with competition as their main theme. Among them, Tiebout's theory stands out as an important contribution to the competition of jurisdictions. The aim of his theory was to clarify how a government could assess the needs of its population and allocate its resources more efficiently. According to Tiebout, individuals that were free to move would go to the jurisdiction that better satisfied their needs. Consequently, governments would know for sure that those individuals wanted the services that they were being offered. Tiebout's theory showed that competing jurisdictions, when working optimally, could efficiently allocate their resources.

On regulatory competition

The regulatory competition of civil justice systems is developed to a lesser extent compared to the regulatory competition in company, tax, and labour law. It is worth examining the findings and the conclusions regarding these competitions, as they may be useful in light of the following chapters dedicated to the civil justice system competition. The competition of jurisdictions in company law has been particularly active in the US, where states compete with each other to attract companies to incorporate in their jurisdictions. The hope is that these companies will increase the revenue and the benefits of the hosting state. Revenue derives from the incorporation fees or other taxes that companies pay to the tax authorities in the hosting jurisdiction. Along with this direct revenue, there is also certain indirect revenue as well as benefits that states hope to gain. Among other benefits, competition in company law increases the revenue of the local lawyer community and the local professional community involved in the business of company law. These groups pay taxes and provide employment, which increases the welfare of the competing state. It can be expected that a civil justice system competition will provide similar incentives for competing states. However, because of Delaware's dominant role and the relatively passive role of the other states, it is still debatable whether competition in company law in the US is over. It has been argued that it is not over, but continues at a low level of intensity. Competitive pressure to change and to improve still exists, and remains important for the development of legislation.

In labour law, jurisdictions compete to attract the best segment of the workforce, by offering good working conditions, work security, and other benefits. Better working conditions improve the performance and the productivity of the workforce, which is beneficial for the government. However, competitive jurisdictions attract the best elements of non-competitive jurisdictions, and thus deplete the latter's human resources. This consequence is called social dumping, which – combined with other factors – makes it extremely difficult for certain societies to be able to overcome their own period of under-development. This

under-development also has a legal aspect, which is worrying when it applies to the civil justice system competition.

Competition in tax law suggests that some jurisdictions use their legislation to attract businesses. This comes as no surprise, considering companies' sensitivity with regard to taxation. Symmetric tax competition is the competition of similar-sized jurisdictions, while asymmetric tax competition is the competition of jurisdictions of different sizes. Size is important in tax competition because it denotes the sensitivity of a jurisdiction to revenue derived from taxation. Small jurisdictions are less sensitive, which means they can lower their taxes and be more attractive. Large jurisdictions are more sensitive, which means they cannot lower the level of taxation too much. This is owing to the presence of a static tax base, which is that segment of the business population that is not able to move from one jurisdiction to another. In general, this is the largest part of the population that the government tries to satisfy. Developing jurisdictions are more prone to lower the standards of their tax legislation in order to be attractive to companies. Lowering standards because of competition has been described as a race-to-the-bottom.

The idea that competition promotes a race-to-the-bottom implies that the quality of law deteriorates. When discussing deterioration, it is assumed that the discussion is from the perspective of the weaker party, because they are vulnerable to the abuses of more sophisticated parties, and therefore deserve the protection of legislators. A race-to-the-bottom apparently occurs to the detriment of these weaker parties, although some scholars point out that this is not entirely true. Competing jurisdictions improve their legislation in order to be attractive to legal customers, and these attempts to compete promote a race-to-the-top. In order to prevent a deterioration in the quality of their law, competing jurisdictions can agree on a set of minimum legal standards that cannot be breached. These standards guarantee the basic rights of weaker parties, and can promote a race-to-the-top on the basis that lowering the standards is not possible. The top-bottom dichotomy can be criticised, however, for not being able to depict all the shades of competition. A suggestion is to use laxity-strictness and desirability-undesirability as measurements; indeed, it can be argued that more measurements can better describe the effects of competition on law.

On choice

The choosing of a court is a psychological process that begins internally and manifests in the outside world in the form of a selection. The choice process is influenced by preferences and the categorisation of needs that exist – consciously and unconsciously – in everyone. Conscious preferences are influenced by past experiences, taste, intellect, and other factors, while unconscious preferences are

based on the biases and prejudices that choice makers may not even be aware that they have. These preferences are used to fulfil certain categories of needs. And although categories can be equally significant, they also differ in importance. Choice makers would tend to satisfy the most important categories, first in accordance with their conscious and unconscious preferences. However, making a choice is not so easy. In modern societies where sources of information are widespread, everyone is assumed to be capable of making a good – or appropriate – choice. For this reason, some individuals find themselves under pressure. Anxiety also increases when choice makers face a growing number of choices. As a consequence, some people fail to make a choice at all, or surrender their choice privilege to someone else. Lawyers are important actors in the civil justice system competition, and are not insulated from these choice-related problems. It can be argued that lawyers face the same difficulties, are affected by biases, and perceive anxiety the same way as anyone else faced with having to make a choice. It was suggested in Section 2.5 that lawyers might be choice Maximisers, which means they tend to aim for the best, and therefore during their choice making process they face difficulties in determining the most favourable option. They are often dissatisfied with their choice. These psychological constraints play an important role for choice makers, and consequently for the civil justice system competition. Further studies on this issue would provide more robust results and conclusions.

This chapter introduced certain important topics and notions relating in general to the civil justice system competition. However, the major focus of this study is the competition in the European Union. The following chapter provides an analysis of the legal framework with regard to choice of court and choice of law, and is in the form of a discussion on the interaction between harmonisation and the civil justice system competition.

Chapter 3 Freedom of choice, harmonisation, and the competition of jurisdictions in the EU

3.1 Choice of court in the Brussels I (recast) Regulation and the civil justice system competition

The legal possibility of choosing a court is one of the most important, if not *the* most important, elements that fosters the development of the civil justice system competition. In the EU, choice of court is regulated by the Brussels I (recast) Regulation. In addition to choice of court, this Regulation sets the rules on jurisdiction, and on the recognition and enforcement of court decisions. The Regulation is based on a number of principles that support party autonomy and the freedom to choose. Therefore, it is important for this research to discuss the most significant principles and articles related to the civil justice system competition. While attention is focused on the part of the Regulation that allows choice of court, the first section provides an outline of the Regulation's other articles.

3.1.1 From the Brussels Convention to the Brussels I (recast) Regulation

This section provides a brief overview of the historical steps that marked the creation of the Brussels Regime, describing the path from the Brussels Convention to the Brussels I (recast) Regulation.

The original six Member States of the European Economic Community (EEC) had a common interest in facilitating trade and economic exchange. In keeping with the EEC Treaty provided in Article 220, Member States were entitled to enter into negotiations with each other to secure the simplification of formalities and procedures for the reciprocal recognition and enforcement of judgments. On 27 September 1968, Belgium, France, Germany, Italy, Luxemburg, and the Netherlands signed the treaty known as the Brussels Convention. The drafting Committee was daring enough to propose rules not only on the recognition and enforcement of court decisions but also on assigning the jurisdiction of courts in international cases.²⁴⁰ This proposal avoided concepts related to nation states like

²⁴⁰ Bogdan (2012) 31.

reciprocity or nationality as a connecting factor.²⁴¹ Abandoning nation-related concepts meant that the EEC regarded Member States as parts of a single unit, which would be the basis upon which the Brussels Regulations would stand. To guarantee the uniform interpretation and application of the Convention, the European Court of Justice (ECJ) was given jurisdiction to interpret it.²⁴² Indeed, the distribution of jurisdictions among Member States is important, but a uniform interpretation is also of considerable significance.

The problem with having a convention and making frequent modifications, however, is that not all the contracting countries ratify and adopt changes at the same time, and this created discrepancies between Member States and legal uncertainty for end users. Furthermore, Member States had to create legislation that implemented the Convention, which was costly.²⁴³ The problem related to the uniform application of the Convention's revisions was resolved by the Amsterdam Treaty on the EC.²⁴⁴ Articles 61 and 65 made cooperation in matters of police and justice a community competence (Art. 85 of the TFEU). Based on this, on 22 December 2000, the Commission adopted Regulation No. 44/2001,²⁴⁵ better known as the Brussels I Regulation, which entered into force on 1 March 2002. This Regulation was based on the Brussels Convention, and, apart from certain changes, they were very similar.²⁴⁶

Ten years after the entry into force of the Brussels I Regulation, the Council and the European Parliament approved a recast version. The most important changes in light of the civil justice system competition were the abolishment of exequatur procedures, the extension of some of jurisdictional rules to third-country defendants, and the enhancement of the effectiveness of the choice of court clauses.²⁴⁷ This regulation was adopted on 17 December 2012 as Regulation No. 1215/2012,²⁴⁸ and it repealed Regulation No. 44/2001, becoming applicable on

²⁴¹ Magnus (2016) 18.

²⁴² This competence was based on the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. This Protocol entered into force on 1 September 1975.

With regard to the Regulations Brussels I and Brussels I (recast) this competence derives from Article 267 of the Treaty on the Functioning of the European Union (formerly Article 234 EC Treaty).

²⁴³ Fawcett, Carruthers, North (2008) 205.

²⁴⁴ Van Calster (2016) 13-20.

²⁴⁵ Official Journal L 012, 16.1.2001 p. 1-23.

²⁴⁶ Denmark has signed a separate treaty with the EU on the application of the Brussels I Regulation in Denmark. The treaty entered into force on 1 July 2007.

²⁴⁷ Magnus (2016) 23. See also Kramer (2010).

²⁴⁸ OJ L 351, 20.12.2012, p. 1-32.

10 January 2015.²⁴⁹ Even before then, however, it was amended by Regulation No. 542/2014.²⁵⁰ These amendments entered into force on the same day as the Regulation, and aimed at making the Unified Patent Court and the Benelux Court of Justice jurisdiction over the Regulation common courts, which are courts that exercise jurisdiction over matters falling within the scope of the Regulation.

3.1.2 Scope of the Brussels I (recast) Regulation

In accordance with Article 1, the Regulation applies only to civil and commercial matters, regardless of the court or tribunal seised. The term ‘civil and commercial’ is broad, however, and is not defined in the Regulation, resulting in different Member States interpreting the term in diverse ways.²⁵¹ To avoid confusion and uncertainty, ‘civil and commercial’ should be given an autonomous interpretation. The CJEU’s autonomous interpretation has been developed gradually through some landmark cases that include, among others, *Eurocontrol*,²⁵² *Rüffer*,²⁵³ *Gemeente Steenbergen*,²⁵⁴ and *Sonntag*.²⁵⁵ In an effort to exemplify the types of cases to be excluded from the scope of the Regulation, the second sentence in Article 1 refers to matters of revenue, customs, or administration, or to the liability of the State for acts and omissions in the exercise of State authority. For example, if a person enters into a conflict with a state authority exercising its public

²⁴⁹ Article 81 of the Regulation distinguishes between entry into force and becoming effective. The Brussels I (recast) Regulation entered into force twenty days after being published in the Official Journal of the EU, and became applicable from 10 January 2015. This is in contrast to the Brussels I Regulation (Article 76), where these steps were not detailed in the Regulation, which provided only the date of its entry into force.

²⁵⁰ OJ L 163, 29.5.2014, p. 1–4.

²⁵¹ Bogdan (2012) 35.

²⁵² In the *Eurocontrol* case, the Court decided that the terms civil and commercial should be interpreted autonomously. Furthermore, the Court found that the services of the defendant Eurocontrol being ‘obligatory and exclusive’ qualify it as being a body exercising state power (*iura imperii*). Case 29-76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* 1976 European Court Reports 1976-01541 14 October 1979 (Court of Justice).

²⁵³ In *Rüffer*, the court clarified that a public authority acting based on national law and performing an international obligation should be considered a public authority. Case 814/79 *Netherlands State v Reinhold Rüffer* 1980 European Court Reports 1980-03807 16 December 1980 (Court of Justice). See also Rogerson (2016) 65.

²⁵⁴ In *Gemeente Steenbergen*, it was decided that, on the one hand, there are actions that are based on ordinary law and are matters of private law, while, on the other hand, there are actions that the legislator conferred on public authority as a prerogative of its own. The former action falls within the scope of the Regulation, while the latter is a matter of public law and is excluded from the scope of the Regulation. Case 271/00 *Gemeente Steenbergen v Luc Baten* 2002 European Court Reports 2002 I-10489 14 November 2002 (Court of Justice).

²⁵⁵ In *Sonntag*, the court considered that a teacher, although employed in a publicly funded school and performing a public duty, can be held liable for compensation under civil law. Case 172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann* 1993 European Court Reports 1993 I-01963 21 April 1993 (Court of Justice).

obligations, this conflict is excluded from the scope of the Regulation, but if a state authority is acting as a private entity, the Regulation is applicable. It does not matter whether the proceeding is brought on behalf of or against a state authority.²⁵⁶ Article 1(2) specifies some exclusions from the scope of the Regulation. In addition to arbitration and bankruptcy, these situations are considered to have no connection to international business, and therefore are to be covered by other instruments.²⁵⁷ Arbitration is excluded from the Regulation's scope because the 1958 New York Convention regulates matters of arbitration satisfactorily for Member States. The same is also true for situations of bankruptcy, which are to be handled in accordance with the Insolvency Regulation.²⁵⁸

A *sine qua non* requirement for the application of the recast Regulation is the existence of a cross-border element,²⁵⁹ which should be checked by the court before it begins to apply the Regulation. This requirement, which is a cornerstone of private international law, is mentioned in the recitals of the Brussels I Regulation. In general, the Regulation refers only to cases where the existence of a cross-border element is evident (domicile in another Member State, cause of conflict located in another Member State, immovable property located in another Member State). In particular, Recital 3 mentions the existence of a cross-border implication for the creation and development of this Regulation. Despite the lack of definition in the Regulation, CJEU case law has clarified the meaning of cross-border element. Two cases should be mentioned here: *Owusu* and *Lindner*.²⁶⁰ According to the court, a distinction should be made between, on the one hand, the conditions under which the rules of jurisdictions must apply, and, on the other hand, the criteria by which international jurisdiction is determined. These criteria should be uniform among Member States, and guarantee legal certainty and uniform application in the European Union.²⁶¹ This means that the Regulation would apply to disputes not only within the EU but also to those with a cross-border element not related to the EU. However, it is important to stress that the Regulation should not be viewed as a mechanism that allows purely national cases to be exported outside their jurisdiction.

²⁵⁶ Bogdan (2012) 35.

²⁵⁷ Van Calster (2016) 23-24.

²⁵⁸ Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1–18.

²⁵⁹ International element or foreign element are often used instead of cross-border element.

²⁶⁰ Case C-327/10 *Hypoteční banka a.s. v Udo Mike Lindner* 2011 European Court Reports 2011 I-11543 17 November 2011 (Court of Justice).

²⁶¹ *Lindner* paragraph 33.

As mentioned above, the Regulation is directed to civil and commercial cases, and was emphasised by the Court in several instances, by excluding cases of a non-commercial nature as often as possible. The Regulation remains an instrument that facilitates the free movement of judgments and cases, and helps trade and commerce by reducing legal barriers and procedures. This not only benefits commerce but creates an environment with potential for the development of competition between courts. While the CJEU considered mutual trust a cornerstone of the Regulation, it has made courts of different Member States trust each other not only in the quality of their decisions but also in the procedures they offer. Given that courts of different Member States are considered to be of the same quality, parties can choose to bring cases to the court that best satisfies their needs, without fearing obstacles to their recognition or enforcement. Jurisdictional rules, mutual trust, and an autonomous interpretation of the Regulation create the premises for the civil justice system competition. The following section provides an overview of the Regulation's jurisdictional rules.

3.1.3 Choice of court and principles

This section provides an analysis of the rules regarding choice of court as formulated in the Brussels I (recast) Regulation, and the principles on which these rules, and more in general the Regulation, are based.

3.1.3.1 Principles

From the perspective of the civil justice system competition, the most important principles employed in the application and interpretation of the Regulation are mutual trust, party autonomy, autonomous interpretation, and *lis pendens*. *Forum non conveniens* is another principle that – although it does not apply in the Regulation – is also important in increasing the certainty of cross-border litigation.

Autonomous interpretation

A common problem for international legal instruments concerns the differences in interpretation adopted by different contracting states; coupled with an uneven application, these can have negative effects on legal certainty. Since the adaptation of the Brussels Convention, CJEU case law has clarified that the Convention (and as a consequence the Regulation) should be interpreted autonomously. In this regard, two cases should be mentioned: *Tessili v Dunlop* and *LTU v Eurocontrol*. In *Tessili v Dunlop*,²⁶² among others, the Court decided that the decision on how to interpret principles or concepts should be made

²⁶² Case 12-76 *Industrie Tessili Italiana Como v Dunlop AG* 1976 European Court Reports 1976-01473 6 October 1976 (Court of Justice).

separately for each provision.²⁶³ In *LTU v Eurocontrol*,²⁶⁴ the Court concluded that Article 1 of the Convention should have an autonomous interpretation,²⁶⁵ which became the principle to be used in the interpretation of the Regulation. An autonomous interpretation guarantees that the Regulation's terminology will not be affected by the legal order of Member States, and that the Regulation is self-sufficient in terms of its own interpretation, thus offering parties an increased certainty that the Regulation will be applied uniformly across the EU.²⁶⁶ The development of the principles of autonomous interpretation helped the establishment of other principles such as mutual trust between Member States, certainty in the allocation of jurisdiction, and party autonomy.²⁶⁷

Mutual trust

One of the most important pillars of the Brussels I Regulation is that of mutual trust between Member States.²⁶⁸ Although a form of mutual trust existed before the Brussels I (recast) Regulation, court decisions required procedural steps by foreign courts in order to be recognised or enforced. The recast Regulation's innovation was to abolish special procedures needed for enforcement of judgments required in many Member States (Art. 36-44).²⁶⁹ However, it did not establish complete mutual trust.²⁷⁰ Rules on the refusal of recognition and of enforcement are listed in Articles 45 and 46, which can be invoked in the event of public policy concerns and problems with judgments given in default of appearance. These articles remain in the Regulation as reminders that mutual trust still has some way to go in the European Regulations.²⁷¹

²⁶³ Bogdan (2012) 34.

²⁶⁴ Case 29-76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* 1976 European Court Reports 1976-01541 14 October 1979 (Court of Justice).

²⁶⁵ See *infra* the *Rüffer* case. See also case 292/05 *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias* 2007 European Court Reports 2007 I-01519 15 February 2007 (Court of Justice).

²⁶⁶ Magnus (2016) 40.

²⁶⁷ Rogerson (2016) 61.

²⁶⁸ Van Calster (2016) 26; Weller (2017) 6. There appears to be no definition of 'mutual trust'; see Kramer (2011) 10-12.

²⁶⁹ On mutual trust and the abolition of exequatur, see European Commission (2010) 6.

²⁷⁰ In the *Gasser* case, the Court maintained that the Brussels Convention is necessarily based on the mutual trust, but States could still maintain mechanisms for their recognition and enforcement. The same was reaffirmed as well in the *Turner* case. This would be similar to saying 'I trust you, but I will still check to see whether you misbehaved'. Case C-116/02 *Erich Gasser GmbH v MISAT Srl* 2003 European Court Reports 2003 I-14693 9 December 2003 (Court of Justice), paragraph 72. Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*. European Court Reports 2004 I-03565 27 April 2004 (Court of Justice), paragraphs 24 and 25.

²⁷¹ Mutual trust faces considerable challenges. Weller provides a concise exposé of related problems; see Weller (2017). See also Hazelhorst, who provides a careful analysis of the

Legal certainty

The CJEU has linked mutual trust and autonomous interpretation to the concept of legal certainty. Legal certainty derived from mutual trust and autonomous interpretation benefits cross-border trade and litigation, which are crucial ingredients for the development of a common European civil justice market. In integrated markets, it is easier to see the development of competition between states to attract cross-border litigants, but it also becomes easier for litigants to choose where to litigate and to adjust their choice to their needs. It can be said that the civil justice system competition is one of the beneficiaries of an independent interpretation of the Brussels I (recast) Regulation and of an increased mutual trust between Member States.

Party autonomy

Another important principle of the Brussels I (recast) Regulation is party autonomy.²⁷² In Europe, party autonomy is the core principle of private international law, and is fundamental to the Rome I and Rome II Regulations.²⁷³ Party autonomy is vital for the development of the civil justice system competition,²⁷⁴ as it allows parties to choose the court that best satisfies their needs. In the Brussels I (recast) Regulation, party autonomy is framed by Article 25, while Articles 15, 19, 23, and 26 allow some form of party autonomy restricted by special requirements.²⁷⁵ In principle, party autonomy implies the freedom of contracting parties to choose the law as well as the court that will govern or resolve their dispute.²⁷⁶ This liberty is based on the conviction that parties can best assess their own needs, and determine the law or the courts for their legal relationship. Conveniently, parties can allocate their resources more effectively, and increase their productivity. Apart from this economic connotation, party autonomy also has a political significance. It allows parties to escape the tutelage of the state and to decide for themselves the best legal solution.

free movement of justice in the EU and discusses related to Mutual Trust and recognition and enforcement: Hazelhorst (2016).

In this regard, the CJEU confirmed in *Aguirre v Pelz* that ‘the principle of mutual trust between Member States [is based] in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights’. See case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* 2010 European Court Reports 2010 I-14247 22 December 2010, paragraph 70.

²⁷² Party autonomy is discussed further in Section 4.1.1.1.

²⁷³ Heiss (2009) 1.

²⁷⁴ Peters (2014) 57.

²⁷⁵ Recitals 14, 15, and 19 should be considered in this regard as well. These recitals recognise the importance of party autonomy also in relation to other rules of the Regulation.

²⁷⁶ Kramer and Themeli (2017) 30.

However, the freedom that comes with party autonomy is restricted under special circumstances. Regulations set certain limits that aim at protecting weaker parties or public interests. Weaker parties are protected because of their limited bargaining power compared to commercial parties, or because of the information asymmetries that plague individuals and consumers in comparison to professionals and commercial parties. While weaker parties are able to express their choice of court, this choice can be suppressed by a party with superior bargaining power, or misjudged in the event of information asymmetry. These situations do not seem to represent the will of both parties, which means that they go against the idea that party autonomy serves to allocate resources more efficiently. In view of this, party autonomy in the Brussels I (recast) Regulation is restricted to the benefit of weaker parties. Examples of this are the rules on jurisdictions in matters relating to insurance, consumer contracts, and individual contracts of employment. Restrictions on party autonomy for protection of the public interest are intended to defend against abuses regarding freedom of choice. In the recast Regulation, these restrictions are provided by Article 24. Despite the restrictions, however, party autonomy is relatively sufficient for commercial parties, which benefits the civil justice system competition.

Forum non conveniens and lis pendens

Forum non conveniens is a principle according to which a court can decline jurisdiction if it considers that another court would be more appropriate to decide on the case presented. While the Regulation is not explicit in forbidding *forum non conveniens*, the CJEU has been very clear in that this principle is not part of the aim of the Regulation. This does not mean that courts should accept all the cases referred to them. Cases should still be within the scope of the Brussels I (recast) Regulation. In particular, and in addition to other elements, a case should have a cross-border element. While these components are mentioned in Article 1, the cross-border element is mentioned in Recital 3 of the Regulation, and has been refined by the CJEU in three important cases: *Owusu*,²⁷⁷ *Maletic*,²⁷⁸ and *Corman-Collins*.²⁷⁹ In these cases, it was reaffirmed that courts cannot deny jurisdiction

²⁷⁷ In *Owusu*, the CJEU ruled that a court cannot deny jurisdiction on the grounds that another court has more connecting factors with the case. Case C-281/02 *Andrew Owusu v N. B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* 2005 European Court Reports 2005 I-01383 1 March 2005 (Court of Justice).

²⁷⁸ In *Maletic*, the CJEU examined the existence of cross-border elements in a situation involving a claimant on one side and a principal and its agent on the other. Case C-478/12 *Armin Maletic, Marianne Maletic v lastminute.com GmbH, TUI Österreich GmbH*, ECLI:EU:C:2013:735. For more, see Vlas (2016) 110.

²⁷⁹ In *Corman-Collins*, the CJEU reaffirmed the need for a cross-border element for the application of the Regulation, and that the rules of the Regulation must be applied and prevail over national law. Case C-9/12 *Corman-Collins SA v La Maisin du Whisky*, ECLI:EU:C:2013:860.

claiming *forum non conveniens*; which implies that a choice of court is absolute and Member States cannot refuse jurisdiction.

Another principle of the Regulation is the avoidance of *lis pendens*. *Lis pendens* are situations in which the same case involving the same parties and the same dispute is brought in front of two or more courts. Article 29 provides that – with the exception of the court first seised – the other Member State courts should stay proceedings. Thus, the court first seised has precedence in two ways: first, it makes the other courts stay proceedings, and second, it makes them decline jurisdiction once the court first seised assumes jurisdiction.²⁸⁰ Article 30 regulates situations in which related actions have been initiated in two or more Member States. Related cases are those that are so closely connected that it is expedient to hear them together. In these situations, there is a risk of providing inconsistent judgments that would result in legal uncertainty and confusion. As with Article 29, Article 30 gives precedence to the court first seised, and the other courts must stay proceedings.

In general, Articles 20 and 30 provide steps to be followed if more than one court is seised with the same or related cases. In both instances, precedence is given to the court first seised. *Lis pendens* together with *forum non conveniens* are important in improving legal certainty. While *lis pendens* avoids inconsistent decisions, *forum non conveniens* guarantees that Member State courts will not decline jurisdiction without sufficient justification. The legal certainty resulting from these principles benefits cross-border litigation and the civil justice system competition.

3.1.3.2 Choice of court

As shown in the previous sections, private international law in the EU is characterised by increased levels of mutual trust, which – together with clear rules on the assignment of jurisdictions and on the recognition and enforcement of judgments – facilitates parties' autonomy to choose a court across borders. Choosing a court means that the conflict and the parties will submit to its judicial system and procedural law. Choice of court is of tremendous importance for the case, as it influences parties' legal strategies and the final outcome of the litigation. Choosing a convenient court on these grounds in fact creates the premises for the civil justice system competition.

Article 25 of the Regulation provides the rules for the choice of court between two parties for their present and future conflicts. This article sets the rules for parties to express their autonomy and to choose the court that best serves their

²⁸⁰ Fentiman (2016) 714.

needs. This section provides an overview of the scope and limitations of Article 25, and its aim is to demonstrate both the legal potential and the limits with regard to choosing a court in view of civil justice system competition in the EU.

Scope and limitations

Article 25 regulates the choice of jurisdiction by agreement, and is applicable regardless of the domicile or the nationality of the parties. Considering that the other articles of the Regulation apply mostly to persons domiciled in a Member State, Article 25 can be considered an extension of the Regulation's personal scope. As a result, the demand side of the civil justice system market stretches beyond the borders of the EU. While Member State courts can in principle be reached by litigants from around the world, this extension is primarily important for the attempts to attract litigants in the immediate vicinity of EU borders.²⁸¹ For Article 25, the qualities of the parties are not important, as the article applies both to legal and to natural persons. However, it should be taken into account that if natural persons comprise one of the categories protected as being a weaker party, Article 25 becomes inapplicable in favour of the relevant provision.

Article 25 is applicable if the parties choose the court of one or more Member States to have jurisdiction over their disputes. No connection is required between the parties or their dispute and the court chosen.²⁸² The parties' choice creates the necessary connection, and, considering that the domicile of the parties is not relevant, it can also be the only factor connecting parties to the EU. This means that Article 25 should also apply to purely national cases: for example, if two Hungarian companies are involved in a dispute related only to Hungary, they can choose to litigate in Austria. Choosing the Austrian court is sufficient to internationalise the case and to confer jurisdiction on the Austrian court. While the Regulation is intended to govern the prorogation of jurisdictions, doubts exist about the applicability of Article 25 in cases of derogation. In these cases, parties exclude one or more courts from hearing their disputes, but do not point explicitly to the court that will hear their disputes.²⁸³ It can be argued that the intention of Article 25 is to allow parties freedom to choose the court that best serves their

²⁸¹ In this regard, attempts by Germany and England to attract Russian or Middle Eastern litigants serve as the best example. See also Section 5.2 for an overview of such activities.

²⁸² Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* 1999 ECR 1999 I-01597; Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* 1997 ECR 1997 I-00911; Case C-269/95 *Francesco Benincasa v Dentalkit Srl* 1997 ECR 1997 I-03767; Case 56/79 *Siegfried Zelger v Sebastiano Salinitri* 1980 ECR 1980-00089.

²⁸³ Magnus (2016) 610.

needs and that increases legal certainty. The derogation of courts should be accepted if it increases legal certainty and best serves parties' interest.

Article 25 requires the Regulation to have entered into force in the jurisdiction chosen by the parties at the time the disputes arrived for judgment by the court. It does not matter whether parties made their choice before the entry into force of the Regulation – it is still valid if all the requirements of Article 25 are met. It should also be considered a valid choice agreement for a state that has become a member of the Union by the time the dispute reaches its courts, even if the choice was made before the state became a member. Parties can make a choice of court for future and present disputes, provided that they are linked to a specific legal situation.

The choice of court made in accordance with Article 25, apart from certain exceptions, cannot be imposed upon third parties. An example of this exception involves contracts for the benefit of third parties.²⁸⁴ In this situation, third parties are obliged to follow the choice of court made by the contracting parties. Furthermore, parties' choice of court cannot extend to contracts connected to the legal situation for which the choice of court was made. Despite the connections, the contracts are considered separate, and each should involve a specific choice of court. The legal relationship referred to in Article 25 should be taken into account in view of the scope of the Regulation and other relevant articles. Obviously, civil and commercial matters define the scope of the Regulation, and consequently the scope of Article 25. However, its effect is reduced by the provisions of Article 24 (exclusive jurisdiction), Articles 10-16 (matters relating to insurance), Articles 17-19 (consumer contract), and Articles 20-23 (individual employment contract). Despite limitations, the material scope of Article 25 remains broad enough for commercial parties to make a choice of court within the European Union. Considering that commercial parties are also expected to generate the demand side of the civil justice system market, the material extent of Article 25 is important for the development of competition between jurisdictions.

Effect and validity of choice

Parties' agreement on choice of court gives exclusive jurisdiction over the dispute only to the court chosen. This means that any other court must refuse jurisdiction. An exclusive choice of courts excludes not only other jurisdictions but also other courts within the same jurisdiction if a specific court has been selected. Parties, however, can agree otherwise, and make the choice of court agreement non-exclusive. Choice of court in this case becomes indicative, in the sense that it gives jurisdiction not only to the court mentioned in the choice of court agreement but

²⁸⁴ Magnus (2016) 663.

also to the courts that would have jurisdiction in the absence of the agreement. Obviously, court exclusivity does not mean that parties can override the provisions of Article 24 (exclusive jurisdiction), Articles 10-16 (matters relating to insurance), Articles 17-19 (consumer contract), and Articles 20-23 (individual employment contract). Exclusivity is very important for the competition of jurisdictions, as it demonstrates parties' intention to invest one or more courts and to exclude others from involvement with the dispute. It is a clear indication that parties want a specific court to adjudicate.

The validity of the choice of court agreement can be reviewed by the court of the Member State where the claim is brought. The court should examine the agreement's validity before starting the proceeding, without asking parties for permission. The court's first procedural step would be to review whether there is a violation of Article 24 of the Regulation (Art. 27), or of other Articles that provide protection to weaker parties (Art. 28). The next step would be to establish whether the choice of court agreement is null and void according to the court's jurisdictional rules. However, it does not matter if the parties present before the court do not challenge its jurisdiction; weaker parties, nevertheless, should be informed about their right to contest jurisdiction (Art. 26). If parties challenge the validity of the choice of court agreement, the court will use the law of its own jurisdiction, including the conflict of law rules, to determine the substantive validity of the agreement.

Form of the agreement

An important step for the choice of court agreement is the creation of the agreement itself. Obviously, agreeing parties should be free of any physical or psychological constraints, and be able to express their free will unhindered. The reaching of the agreement should be evidenced in the forms required by Article 25. The forms are alternatives to each other, and filling in the requirements of any one of them is sufficient. One of the required forms and the consensus between parties should be present in the agreement. If either is missing, the agreement becomes invalid. Article 25 recognises agreements that are in writing or evidenced in writing, that are in any form that is in keeping with established practices between the parties, and, in international trade and commerce, that are in any form that is widely recognised by those trade practices. Durable electronic communications should be considered as writing. As regards the written form of the agreement, nothing more is required. However, the agreement needs to be clear about the identity of the parties, should identify well the chosen court, the legal relation between the parties, and the conflict that the parties want to address to the court. The term 'evidenced in writing' is a softening of the 'writing' requirement. It allows parties to validate at a later stage a verbal agreement that was made earlier. While the English version of the Regulation is not clear in its

formulation, the Regulation's version in other languages clearly refers to prior oral agreements that need to be confirmed in a written form.²⁸⁵ The written form serves as evidence of the real agreement that was concluded orally. As a consequence, the written confirmation should make clear the existence of a prior verbal agreement and its terms. For the validity of the written confirmation, one of the parties is required to present the written confirmation to the other party, and the receiving party does not object to the confirmation. Another valid form of agreement is that concluded in accordance with established practices between parties. 'Established practices' are not defined in the Regulation, but it can be expected that such practices should be regular, take place often, and last for a relatively long time. It should be clear in these practices that the parties agree on a choice of court, and that there is certainty regarding the court chosen. A similar reasoning should be followed for cases of international trade or commerce, where parties can make a choice of court in accordance with trade practices. This is mostly directed at experienced professional traders well acquainted with trade practices. Allowing parties engaged in international trade to use these established practices is vital, considering that rapidity and simplicity are important in these parties' environment.

Severability

Article 25(5) recognises the severability of the choice of court clause from the contract to which it is attached. The choice of court agreement should be seen as separate, which means that its validity is not related to that of the contract. A choice of court agreement can be valid even if the contract it is connected with is not.

3.1.4 The mechanics of the Regulation

For the civil justice system competition, the Regulation's most important rule has to do with the freedom of parties to choose the court through an agreement. In the absence of a choice of court agreement, the general rule of the Brussels I (recast) Regulation provides that the defendant be sued in the court of the Member State where he is domiciled (Art. 4), although in special circumstances a defendant may be sued in the courts of another jurisdiction (Art. 5). These circumstances (Art. 7, 8, and 9) allow claimants to choose between at least two countries, thus giving competing Member States an opportunity to attract them. Claimants that make a unilateral choice of court create a special type of demand that is analysed in Section 4.5.1. The Regulation provides specific protection for weaker parties in

²⁸⁵ Magnus (2016) 641. An official English version of the regulation reads, 'in writing or evidenced in writing'. The official version in some other languages would translate into English as 'in writing or verbally with confirmation in writing'. Among the languages that mention an oral agreement are French, German, Spanish, and Portuguese.

matters related to insurance contracts, consumer contracts, and individual contracts of employment (Art. 10-23). Despite the freedom guaranteed by the Regulation, however, some special situations are guaranteed an exclusive jurisdiction (Art. 24). This brief outline is followed by a short exploration of the above-mentioned rules and the principles that support them.

3.1.4.1 Default rule: defendant sued in his domicile court

In the absence of a choice of court, the Regulation's default rule is that the defendant will be sued in the court of his domicile (Art. 4). Referring to domicile, Article 4 applies irrespective of the nationality of the defendant, and therefore is also applicable to persons that are not nationals of a Member State.²⁸⁶ Domicile for natural persons should be defined according to the national law of each Member State, while domicile for legal persons should have an autonomous definition. There is no clear definition of convenient courts or of the characteristics of such courts. It can be said that fast and economical proceedings are always appreciated, but these can vary depending on the industry or characteristics of the market. For example, Dutch courts might be better at deciding on maritime cases, while French courts might be better at deciding transportation cases. Nevertheless, if companies or legal persons consider the characteristics of a court system an important factor in choosing their domicile, this would prompt a competition for civil justice systems between jurisdictions. From the outside, we would observe a migration of companies to one or to a limited number of jurisdictions. However, it is more realistic to think that companies take into account other aspects while choosing their domicile: for instance, tax level, market possibilities, workforce, and so forth.²⁸⁷ However, it is interesting to consider whether the importance of the court system would prevail over the importance of tax level, or of company or labour law.

3.1.4.2 Exceptions to the default rule: unilateral choice of court

Articles 7 and 8 offer alternative jurisdictions to Article 4's default rule, thereby creating a possibility of choices for the claimant. The rules contained in Article 7 point not only to the jurisdiction where the conflict may be submitted but also to its specific courts.²⁸⁸ Based on these alternatives, claimants are not obliged to follow the defendant in the court of his domicile, but can choose between two or more jurisdictions. In other words, the claimant has the possibility of making a unilateral choice of court. A unilateral choice creates a special type of demand in

²⁸⁶ If the defendant is not domiciled in any Member State, the jurisdiction of the court is determined by the national law of that court. In any case, the rules of Articles 24, 25, and 18(1) and 21(2) take priority.

²⁸⁷ Competition in company law was discussed in Section 2.3.1.

²⁸⁸ Mankowski (2016) 144-145.

the civil justice system competition. This demand is different from that created when the court is chosen by both parties, in terms of the elements and the characteristics of the jurisdiction they choose. Section 4.5 provides a detailed analysis of both types of demand. The magnitude of each type is important for the general output of the demand and the signals it gives to competing Member States. The frequency of this type of choice is not clearly known, though it can be argued that companies rather than individuals would be involved mostly in cross-border disputes. A considerable number of companies conduct business, or have daughter companies, in more than one Member State (see the case *BEG v ENEL* in Section 1.1 for example). In light of this, Articles 7 and 8 in conjunction with Articles 4 and 63 would give claimants the possibility of making a choice of court within the EU.

At a glance, the alternatives mentioned in Article 7 offer the possibility of suing a person domiciled in a Member State: for example, in matters relating to a contract; in the courts of the place of performance of the obligation in question; in matters relating to tort, delict, or quasi-delict; in the courts of the place where the harmful event occurred or may occur in relation to a civil claim for damages or restitution that is based on an act giving rise to criminal proceedings; in the court seised for those proceedings, to the extent that this court has jurisdiction under its own law to undertake civil proceedings; as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC,²⁸⁹ and initiated by the person claiming the right to recover such an object; in the courts of the place where the cultural object is situated at the time the court is seised; as regards a dispute arising out of the operations of a branch, agency, or other establishment; in the courts of the place where the branch, agency, or other establishment is situated; as regards a dispute brought against a settlor, trustee, or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled; and as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question has been arrested to secure such payment or could have been so arrested, but bail or other security has been given, provided that this provision

²⁸⁹ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects removed unlawfully from the territory of a Member State, OJ L 074, 27.3.1993, p. 74-79.

The European Parliament and the Council approved a new directive on the return of cultural objects removed unlawfully from the territory of a Member State, Directive 2014/60/EU, OJ L 159, 28.5.2014, p. 1-10. This Directive replaces the one mentioned in the Brussels I Regulation. The reference to Article 1 of the 1993 Directive should be read as referring to Article 2 of the 2014 Directive.

will apply only if it is claimed that the defendant has an interest in the cargo or freight, or had such an interest at the time of salvage. In business practice, in particular alternative contract, tort and branch jurisdiction provide opportunities to one-sidedly choose a more favourable court than that of the domicile of the defendant.

3.1.4.3 Jurisdiction in specific matters

Matters related to insurance (Art. 10-16), consumer contracts (Art. 17-19), and individual contracts of employment (Art. 20-23) have special provisions in the Regulation, which aim at protecting weaker parties in situations where they are most vulnerable.

The main rule in matters related to insurance is that an insurer domiciled in a Member State may be sued in the courts of that Member State; or in another Member State in the event of actions brought by the policyholder, the insured, or a beneficiary, in the courts of the place where the claimant is domiciled; or, if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer. An insurer is also deemed to be domiciled in a Member State if he has an agency or a branch, and if the dispute derives from the activities of the branch or agency.²⁹⁰

Articles 17-19 regulate the jurisdiction over contracts between consumers and parties conducting commercial activities.²⁹¹ The main rule of these articles allows consumers to bring proceedings against the other party either in the court where the consumer is domiciled or in the court where the other party is domiciled. A consumer can be sued only in the court of his domicile.

Articles 20-23 regulate the jurisdiction over individual employment contracts. An employee is allowed the possibility of choosing where to sue the employer, and can choose between the courts of the Member State where the employer is domiciled or the courts of the Member State(s) where he (the employee) carries out his work (Art. 21).²⁹² An employer may bring proceedings only in the court where the employee is domiciled.

A common characteristic of the jurisdiction in sections dealing with specific matters is that they demonstrate that weaker parties are given the possibility of choosing to sue the other party in more than one jurisdiction. This possibility can be significant for the civil justice system competition. However, it can be assumed that weaker parties would choose a court different from that of their domicile only

²⁹⁰ Heiss (2016) 420.

²⁹¹ Mankowski and Nielsen (2016) 464-465.

²⁹² Esplugues Mota and Palao Moreno (2016) 544.

in exceptional circumstances. The typical weaker party is an individual with little knowledge of the law and the courts, and with few means to be mobile. Even competing jurisdictions would not be interested in the type of cases brought by this kind of demand.

In addition to the provisions described above, parties can make a choice of court if the dispute has already arisen or in other limited circumstances an earlier choice of court can have effect. Choice of court in these cases is not expected to promote any competition between jurisdictions, because the weaker party, who is granted more freedom, is expected to have limited mobility and is therefore unable to undertake cross-border litigation. For the reasons listed above, competing Member States are not interested in these kinds of cases. Therefore, any civil justice system competition arising from them is likely to be weak or non-existent.

3.1.4.4 *Exclusive jurisdictions*

Article 24 of the Regulations provides an exhaustive list of situations in which an exclusive jurisdiction is assigned. This means that these provisions cannot be overridden by agreements between parties. Party autonomy in this regard is limited in order to protect public interest. Any agreement contrary to this provision should be considered null and void, and the voluntary presence of a defendant in the court chosen by the claimant cannot override the provisions of Article 24.²⁹³ Given the impossibility of prorogation of the rules set out, this article plays only a small role in the civil justice system competition.

Article 24 provides exclusive jurisdiction in the following cases: those involving rights in *rem* of immovable properties; conflicts over the ‘*validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs*’; conflicts over the validity of entries in public registers; conflicts over the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered; and cases involving the enforcement of judgments.

3.1.5 The recast Regulation and the civil justice system competition

Choice of court agreement is one of the most important elements of the civil justice system competition. The Brussels I (recast) Regulation recognises the role of party autonomy in improving cross-border trade, because it provides parties with more freedom to allocate their resources and plan their legal strategies. This freedom cannot be used to the detriment of weaker parties, however, or to infringe upon social security. For the competition of jurisdictions, Article 25 is the single

²⁹³ As provided by Article 26(1).

most important article in the Regulation, as it opens the doors of Member State courts to litigants that otherwise would not be able to use EU courts. This results in potential users for the courts, and potential clients for the lawyers. In keeping with the Regulation, choice of court agreements are also very flexible, offering parties not only the choice between the court of Member States but also the possibility of choosing a specific court. This freedom to choose should be taken into account by Member States in promoting their jurisdiction. Governments, however, might be reluctant to attract litigants and cases if these lack a factor connecting them to the chosen jurisdiction, also considering that often the law applicable might be that of another jurisdiction. Nevertheless, countries interested in the civil justice system competition should pay closer attention to the possibilities offered by Article 25. Litigants in the immediate vicinity of the EU use Member State courts to avoid corruption problems and if they do not trust their own courts. Member State courts have the opportunity to become global players and to attract litigants worldwide without the need for a connecting factor.

The possibilities offered by the Brussels I (recast) Regulation are important in terms of how the competition of civil justice systems unfolds. Situations where the choice of court is made by only one party create the conditions for competition from unilateral choice of court, which is the case when two parties do not make a choice of court. Without this choice of court and within the possibilities afforded by the Regulation, only the claimant has the possibility of choosing where to start proceedings. Situations where the choice of court is made by both parties create the conditions for competition from bilateral choice of court. Considering the freedom granted by Article 25, parties can choose any of the Member State courts. Although similar, factors considered both in unilateral and bilateral choice of court have their own variations, and differences in choice possibilities prompt diverse reactions both from states and from litigants. Competition from unilateral and bilateral choice of court is analysed further in Chapter 4.

3.2 Choice of law in the EU

Section 3.1 provided an overview of the rules related to the assignment and choice of jurisdiction in civil and commercial matters. These rules, detailed in the Brussels I (recast) Regulation, set the basis for the civil justice competition in the EU. Agreements on choice of court and choice of law are often made in tandem, and they inevitably influence each other. Thus far, this influence has not been well studied, although Section 5.3 tries to fill this gap with data collected from a survey conducted for the present research. The current section provides a brief description of the rules on the law applicable to contractual and non-contractual

obligations as provided in the Rome I ²⁹⁴ and Rome II Regulations.²⁹⁵ Rome I provides rules on the law applicable and the choice of law for contractual obligations, while Rome II provides rules on the law applicable and the choice of law in matters related to non-contractual obligations. The first and second part of this section provide a brief overview of the Rome I and Rome II Regulations, respectively. The third part explores the relation between the Regulations and the civil justice competition in the EU.

3.2.1 Rome I Regulation: the law applicable to contractual obligations

This part gives a brief description of the Rome I Regulation. First, a short introduction and historical description of the Regulation is provided; second, the scope and some rules on the law applicable to contractual obligations are described; third, rules on choice of law are analysed in the context of the civil justice system competition.

3.2.1.1 Introduction

Party autonomy has long been a cornerstone of conflicts of laws in Europe. However, its meaning changed over time, until in the 20th century it reached its current more comprehensive interpretation.²⁹⁶ Party autonomy refers to the freedom parties have to choose the rules applicable to their legal relationship, with as little state interference as possible.²⁹⁷ In the context of private international law, party autonomy means the freedom parties have to choose the law applicable to their relationship, along with the court responsible for their disputes. To enable a uniform application of party autonomy, Member States – though of course spurred by other reasons as well – approved the Rome I Regulation officially named Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations. The Rome I Regulation entered into force on 17 December 2009 in all Member States except Denmark (Recital 46), replacing the Rome Convention. For this reason, Member States in the context of the Rome I Regulation means EU Member States where

²⁹⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

²⁹⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

²⁹⁶ Kramer and Themeli (2017) 30-31, Kuipers (2012) 44-47, Heiss (2009) 1.

²⁹⁷ For more on party autonomy, see as well Section 4.1.

the Regulation applied, excluding Denmark (Art. 1(4)). For Denmark, the Rome Convention is still applicable.²⁹⁸

3.2.1.2 Rome I Regulation: law applicable to contractual obligations

Because the Rome I Regulation is a private international law instrument, its terminology is similar to that of the Brussels I and Rome II Regulations.²⁹⁹ In order to maintain legal certainty and to avoid inconsistencies between these regulations, the Recitals to the Rome I Regulation recommend a uniform and consistent application and interpretation of these terms (Recitals 7, 17, 24, and 39). This fact is important considering that choice of court and choice of law are often negotiated together. Each of these choices is very important to the outcome of any litigation. The chosen law needs to be interpreted by the chosen court, and that court needs to apply the chosen law, which means that one choice would inevitably influence the other. In the survey conducted for this research, respondents were asked to rate which law has the greatest influence on their choice: substantive law or procedural law.³⁰⁰ Results showed that most of the respondents (33.33%) considered substantive law and procedural law to equally influence their choice of court behaviour. However, there was a tendency to consider substantial law to be more important than procedural law. Some respondents commented that substantive law was one of the factors they considered when making a choice of court. However, the survey results seemed to indicate that substantive law was also an important factor. This means that choice of law is extremely important for the choice of court process. Nevertheless, further research is needed to understand their relationship, along with empirical data in support of theoretical advances.

Scope and limitations of application

The Rome I Regulation set the rules on the law applicable to contractual obligations in civil and commercial matters (Art. 1(1)). Civil and commercial matters are terms also used in the Brussels I and Rome II Regulations.³⁰¹ To avoid inconsistencies between both Regulations, their definition should be autonomous and interdependent,³⁰² meaning that any interpretation in cases relating to one Regulation should be accepted and used in the interpretation of the other.

²⁹⁸ Hess (2009) 7, Lüttringhaus (2015) 69.

²⁹⁹ Rome II Regulation is analysed in Section 3.2.2.

³⁰⁰ See Section 5.3.4.3 for more on the survey and its results. This was question 13, where respondents were asked whether their choice was influenced more by substantive law or by procedural law. The options and the responses were: Substantive law (5.59%), Mostly substantive law (21.95%), Somewhat substantive law (6.83%), Equally substantive law and procedural law (33.33%), Somewhat procedural law (4.97%), Mostly procedural law (13.66%), Procedural law (2.69%), N/A (10.97%).

³⁰¹ See also Section 3.1.

³⁰² Lüttringhaus (2015) 26.

Interdependency, legal connections, and interrelations makes even more crucial the need to maintain a uniform interpretation between the Regulations. The meaning of ‘contractual obligations’ in the Rome I and Brussels I Regulations also has an impact on the Rome II Regulation; the term ‘non-contractual obligation’ is used here, and should be understood as an inverse of ‘contractual obligation’ as used in Rome I and Brussels I.³⁰³ The scope of the Rome I Regulation excludes from its application revenue, custom, and administration matters, which are also found in the Brussels I and Rome II regulations. This list is not exhaustive, and it is meant as a set of examples for public functions. Likewise, in the Brussels I and Rome II Regulations, public functions should be excluded.

While Article 1 provides the scope of the Regulation, Article 2 provides for a universal application, meaning that ‘any law specified by this Regulation shall be applied whether or not it is the law of a Member State’. As mentioned, Member States would mean all the states where the Regulation applies. Clearly, the Regulation does not favour any law, and remains neutral as regards the law of any jurisdiction. This non-discriminatory approach fosters a uniform application and the development of trade.³⁰⁴

Applicable law

In the absence of choice of law, the applicable law is assigned in keeping with Article 4 of the Regulation. This is also applicable if parties’ choice of law is invalid, difficult to determine, and in other situations where the parties have made a choice of law, but it is difficult or impossible to accurately determine the correct law.³⁰⁵ In general, Article 4(2) provides for the application of the law of the party that undertakes the characteristic performance in the contract.³⁰⁶ However, if the contract has an element that is related to the cases listed in Article 4(1), this last one applies. And if the circumstances of the case show that the contract is manifestly more closely connected to a country other than those mentioned in Articles 4(1) and (2), the law of that country will apply. The law of the country with the closest connection also applies if the applicable law cannot be determined by the above provisions (Art. 4(4)).

Applicable law in particular cases

The Rome I Regulation contains separate provisions for contracts involving carriage (Art. 5), consumer contracts (Art. 6), insurance contracts (Art. 7), and individual employment contracts (Art. 8). As with Article 4, the provisions of

³⁰³ Lüttringhaus (2015) 28.

³⁰⁴ Ragno (2015) 70.

³⁰⁵ Ferrari and Bischoff (2015) 121.

³⁰⁶ Magnus (2009) 33.

these articles should be applied if parties did not make a choice of law in keeping with Article 3. To distinguish the type of contract, the focal point of obligations needs to be assessed.

For carriage of goods contracts, Article 5(1) provides that the law applicable is the law of the habitual residence of the carrier if this is the same as the place of the receipt or the place of delivery or the habitual residence of the consignor.³⁰⁷ The applicable law for contracts for the carriage of passengers is the law of the country where the passenger has his habitual residence, or where the carrier has his habitual residence, or where the carrier has his place of central administration, or where the place of departure is situated, or where the place of destination is situated. If these requirements fail to be met, or the parties do not make a choice of law, the law of the passenger's habitual residence will apply if the place is the same as the place of departure or the place of destination. If these requirements are not met, the law of the country where the carrier has his habitual residence is to apply.

If parties in an insurance contract did not make a choice of law in keeping with Article 3, the provisions of Article 7 will apply. This article applies to all contracts covering risks within Member States (Art. 7 (1)), regardless of where the covered risk occurs. Article 7(2) provides that the law of the jurisdiction where the insurer has his habitual residence will apply. If it is clear that the contract is manifestly more closely connected to another jurisdiction, the law of that jurisdiction applies. Contracts not covered by Article 7(2) are covered by Article 7(3), which further limits the freedom of choice granted to parties by Article 3. According to Article 7(3), parties can choose only the law of any Member State where the risk is situated at the time of conclusion of the contract; or the law of the habitual residence of the policy holder; or, in the case of life insurance, the law of the policy holder's nationality, or for insurance covering risks limited to events occurring in one Member State; or the law of that Member State, or if the policy holder is a trader or freelancer, and the contract covers two or more risks related to activities in different Member States, the law of any Member State concerned applies, including the law of the policy holder's habitual residence. If the parties did not make a choice of law in accordance with Article 7(3), the law of the Member State where the risk is situated at the time of conclusion of the contract is to apply.

Provisions of Articles 5 and 7 are derogated by Article 6 if one of the parties is an individual acting outside his trade or profession and the other party is a professional exercising his trade or profession. In other words, Article 6 covers

³⁰⁷ Dornis (2015) 202.

cases involving business-to-consumer contracts. If these conditions are not met, Articles 3 and 4 apply. In general, Article 6 aims at protecting consumers from a choice of law that would deprive them of the protection offered by their home jurisdiction.³⁰⁸ Therefore, the minimum standards with which the consumer is familiar are always granted to him. Excluded from the scope of Article 6 are supply of services contracts, contracts of carriage, contracts related to rights *in rem*, financial instrument contracts, and contracts concluded in the financial market.

The last type of contract especially governed by the Regulation is the individual employment contract (Art. 8). As with consumer contracts, the Regulation rules favour employees in terms of them being vulnerable parties.³⁰⁹ In this regard, if the parties did not make choice of law, the applicable law will be considered the law where the employee habitually carries out his work. The parties may also choose the applicable law in accordance with Article 3 of the Regulation, but this choice cannot derogate the protection afforded to the employee if the choice of law was not made. Similar to other provisions, choice of law can be overridden if circumstances show that the contract is manifestly more closely connected with another jurisdiction.

3.2.1.3 Rome I Regulation: freedom of choice

The first basic rule of the Rome I Regulation is that the law applicable to a contract is the law chosen by the parties (Art. 3(1)). This article gives contracting parties maximal freedom to choose what is best for their legal relationship. A Dutch and a German party, for example, may choose to submit their contract to Spanish law, even in the absence of any connection to Spain.³¹⁰ Freedom of choice derives from party autonomy, which is the cornerstone of Article 3 and the Rome I Regulation.³¹¹ However, while party autonomy provides many benefits to trade and to the ability of parties to allocate their resources, it also has undesired externalities.³¹² For these reasons, some restrictions to the freedom of choice exist. First, the Regulation protects weaker parties such as passengers, consumers, employees, and insurance policy holders. These situations have dedicated provisions, which were discussed in the previous section. Second, parties might try to avoid a jurisdiction's mandatory laws by choosing the law of another jurisdiction even though no element is connected to that jurisdiction. To prevent this, Article 3(3) provides that if all the elements of a situation are located in a

³⁰⁸ Ragno (2015) 225-233.

³⁰⁹ Staundiger (2015) 288.

³¹⁰ Kuipers (2012) 46.

³¹¹ Ragno (2015) 77.

³¹² Kramer and Themeli (2017) 35.

country other than the one chosen, the choice of law cannot affect mandatory laws that cannot be derogated from by an agreement in the other country. Overriding mandatory laws are those that parties cannot derogate from by an agreement, and that are important for safeguarding a country's public interest. This rule is important given that private international law and the Rome I Regulation can facilitate an 'escape' from certain rules.³¹³ Limits to this freedom are set out in Articles 9(2) and (3). These paragraphs provide that overriding mandatory provisions cannot be restricted by any article in the Regulation, and that those provisions of the jurisdiction where the obligation arising from the contract have to be performed or have been performed may apply. The same principle is applied to European Union law by Article 3 (4), which extends the application of mandatory law from national law to EU law. In other words, parties cannot choose the law of a jurisdiction outside the EU in order to avoid mandatory EU law. Of course, all the elements relevant to the situation should be located in a Member State in keeping with the meaning of the Regulation. Third, the Regulation limits parties' choice to national law. Fourth, parties' choice of law may become inapplicable if it is 'manifestly incompatible' with the forum's public policy (Art. 21). Fifth, this potential limitation is a consequence of the CJEU's *Ingmar* case,³¹⁴ in which the CJEU decided to apply mandatory EU rules despite the parties' choice of law for a non-member. This limitation by the court was justified by the desire to protect the requirements of the internal market. With regard to this case, however, there is disagreement among scholars.³¹⁵ Given that the case was decided based on the Rome Convention, and that the *Ingmar* situation was not reflected in the Rome I Regulation, this precedent should not be used. However, the court has not expressed its opinion on the matter, which fuels doubts on the validity of the *Ingmar* case.

Article 3 does not require any particular form for the choice of law agreement, but parties should be able to demonstrate the choice made in any form possible. Choice of law can also be agreed verbally, although the parties should be able to prove it. This said, choice of law should be understood as contractual in nature and independent of the main contract; namely, its validity does not depend on that of the main contract. Article 5(3) provides that the existence and the validity of the choice of law agreement should follow the same rules used to determine the validity of the main contract. Parties also have the right to choose the applicable law for the whole or part of the contract, thus allowing different aspects of the contract to be governed by different laws. Choice of law can be changed at any

³¹³ Schmidt-Kessel (2015) 321.

³¹⁴ Case 381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* 2000 European Court Reports 2000 I-09305 9 November 2000 (Court of Justice).

³¹⁵ Kramer (2015) 282, Ragno (2015) 252, Heiss (2009) 8.

time, provided that the contract's formal validity and the rights of third parties are not affected.

It should be made clear that Article 3 is to be read in conjunction with Article 20, so that when parties choose the law of a certain jurisdiction, they choose the substantive law without the conflict of law rules. However, the choice should be as clear as possible. Referring to the law of a country composed of several jurisdictions, and where it is not possible to point out any of the jurisdictions, would make the choice of law clause invalid. Parties have the right to amend their choice of law fully or partially at any time, which, however, should produce effects from the moment of application and not from the beginning of the contract. Hence, the freedom of parties to choose the law applicable to their contractual matters is relatively broad. The limitations mentioned above should be considered protective of particular situations rather than an attempt to restrict the choice of law.

3.2.2 Rome II Regulation: laws applicable to non-contractual obligations

The alter ego of the Rome I Regulation is the Rome II Regulation, which regulates situations involving conflict of laws in non-contractual obligations. Cases excluded from the scope of the Regulation are non-contractual obligations arising from family relationships, from matrimony, wills and succession, from promissory notes, from changes in the registry of companies, from trusts, from nuclear damage, and from violations of privacy and rights related to personality. For the Regulation (Art. 2), non-contractual obligations include damages from torts/delicts, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*.

The law applicable to non-contractual obligations is the law of the country where the damage occurs (Art. 4). If the claimant and the tortfeasor have their habitual residence in the same jurisdiction, the law of that jurisdiction applies. In cases where it is manifestly evident that the situation giving rise to a non-contractual obligation is closely connected to another jurisdiction, the law of that jurisdiction applies. Rome II Regulation has a universal application, which means that the laws specified by its provisions apply regardless of whether they are the laws of a Member State (Art. 3). Other situations specified in the Regulation include product liability (Art. 5), unfair competition and acts restricting free competition (Art. 6), environmental damage (Art. 7), infringement of intellectual property rights (Art. 8), industrial action (Art. 9), unjust enrichment (Art. 10), *negotiorum gestio* (Art. 11), and *culpa in contrahendo* (Art. 12).

Party autonomy to choose the applicable law in cases related to non-contractual obligation is regulated by Article 14 of the Regulation. As with the Rome I Regulation, the parties' choice of law is limited only to the law of a state.

Regulations of international organisations or principles of law cannot be considered a valid choice of law. Article 14(1) allows parties to choose the law only after the event giving rise to the damage has occurred. However, parties pursuing a commercial activity can make the choice of law before the event. These parties should be considered more experienced than non-commercial parties, and therefore more able to make an appropriate choice. There is no form requirement for the choice of law agreement, but parties should be able to prove its existence with reasonable certainty.

The parties' choice of law provided for in the Rome II Regulation is limited to the benefitting of parties in a weaker position, to overriding mandatory provisions, and to specific cases. Third parties can be considered to be in a weaker position when parties make a choice of law. For this reason, the choice of law of two parties cannot prejudice the rights of a third party who is unable to influence the choice of law, but whose rights can be affected. An additional protection of weaker parties is the restriction of non-commercial parties from making a choice of law only after the event giving rise to the damage that occurred. Non-commercial parties do not have sufficient knowledge to make a good choice of law before the event. This inability can be to the detriment of their rights, and more experienced parties can take advantage of it. Another limit to the choice of law is set by the application of overriding mandatory provisions. Article 16 provides that regardless of the choice of law, mandatory provisions of the court are always applicable. Thus, choosing the law of a jurisdiction cannot implicitly exclude the mandatory provisions of the jurisdiction where the litigation will take place. A third group of limitations to the freedom of choice is that related to specific cases. The Regulation provides (Art. 6(4)) that the freedom of parties to choose cannot derogate the provisions of Article 6, which provides the rules on the law applicable in cases of unfair competition and acts restricting free competition. The same restriction to the freedom of choice is imposed by Art. 8(3), which sets the rules on the law applicable in the event of an infringement of intellectual property rights. The freedom of choice provided by the Rome I and Rome II Regulations extends beyond the borders of the EU, thus increasing the possibilities of commercial parties being better equipped to protect their rights and to allocate their resources more effectively.

3.2.3 The Rome Regulations and the civil justice system competition
Party autonomy is an important component of choice of law and choice of court, and both choices are often negotiated and arranged simultaneously. Data from the survey organised for this research hint that choosing the law of a jurisdiction also

induces parties to choose the court of that jurisdiction.³¹⁶ There are several reasons a litigant would be more interested in choosing the court and the law of the same jurisdiction. Two of these are costs and predictability.³¹⁷ Some of the costs incurred for cross-border litigants include the costs of a foreign lawyer, of travel, and of translation. If the law and the court chosen are from different jurisdictions, other costs emerge: e.g. complexity costs related to the application of a foreign law in a court, and costs for any possible extra lawyer for each jurisdiction involved. The predictability and accuracy of the court might also suffer if a judge is asked to interpret and apply the law of another jurisdiction. It can be argued that parties would be interested in having high predictability and accuracy for their litigations. The salient point here is that while the civil justice system competition relies on party autonomy for choice of court, this choice might be influenced by choice of law. For competing jurisdictions, it is important to know which is more important: procedural law or substantive law. As mentioned previously, more empirical research is needed to tackle this problem.

The symbiotic relationship of choice of court and choice of law is reflected in the drafting of the Rome I and II Regulations and the Brussels I (recast) Regulation.³¹⁸ The three regulations should be read and interpreted interdependently, and always taking into account the consequences they have for each other. The Brussels I (recast) Regulation provides rules on choice of court, for both contractual and non-contractual obligations. Considering that parties are influenced by the applicable law when making a choice of court decision, Rome I and Rome II become important in view of the civil justice system competition. The freedom of choice provided in these Regulations is more restricted in cases involving vulnerable parties, as opposed to cases in which two commercial parties are involved. For commercial parties, a limit to their choice is posed by overriding mandatory provisions, and by provisions that cannot be derogated by agreement. To conclude this section, choice of law is considered a factor that influences choice of court, and, as a consequence, also the civil justice system competition. The Rome Regulations are important for the actors involved in this competition. Brussels I, Rome I, Rome II, choice of court, choice of law, and the civil justice system competition are strongly connected to each other; hence, any fine-tuning of one of them would change the melody of the other.

³¹⁶ See Section 5.3.

³¹⁷ See also Sections 4.3.1.1, 4.5.1, and 4.5.2, which expand on costs and predictability regarding choice of court.

³¹⁸ Mentioned also in Recital 7 of the Rome I Regulation and Recital 7 of the Rome II Regulation.

3.3 Harmonisation and competition of civil justice systems

3.3.1 Introduction

While the first two parts of this chapter focused on the legal framework that enables parties to pick the courts and laws of their choice, the present section is dedicated to the harmonisation of civil justice systems in the EU. Harmonisation can unfold in different ways, but its main goal³¹⁹ is to smooth out differences between legal systems, and can go as far as to remove any that are visible. However, removing or lessening differences contradicts the needs of the civil justice system competition, which thrives on diversity. As a consequence, a rising tension between harmonisation and competition is inevitable.³²⁰ It is the intention of this section to explore the interaction between the two processes, and its goal is to identify the potential consequences of this interaction. For this purpose, this section first provides a summary of the different terms used to describe harmonisation; second, it confronts arguments in favour of and against harmonisation; third, it provides an overview of the legal foundations for the harmonisation of civil procedure in the EU; fourth, it analyses the interaction between competition and harmonisation, and its possible consequences.

3.3.1.1 Terminology: Harmonisation, convergence, approximation, and others

Harmonisation is not only a legal concept used exclusively by lawyers and academics – it is also a political term that seems to be increasingly often in use. This extensive use has created confusion with regard to its terminology, as different terms have been used and replaced. These terms include harmonisation, convergence, unification, approximation, homologation, and legal integration, and they are used interchangeably in the context of the European Union.³²¹ In addition, they often bear³²² different meanings of an etymological and a technical nature. In this section, *unification* of legislation refers to the total replacement of national law by a common legislation shared by several jurisdictions. This includes not only the process of unification but also the situation that this process creates. Such a process can be furthered in several ways. One of these is *convergence*, which means that different legal jurisdictions move towards a single unitary legal system. In the EU, convergence through the European Directives and

³¹⁹ Technically, the goal of the harmonisation of civil procedure is to smooth out differences, but tactically it is to improve the internal market and the creation of a common judicial area. These aspects are analysed further in Sections 3.3.2.1 and 3.3.4.

³²⁰ Of course, their relationship would depend on the degree of harmonisation and on the intensity of the competition.

³²¹ Smits (2007) 220.

³²² The word ‘often’ should be stressed here, because it is used deliberately to denote different stages of the harmonisation process.

other legislative instruments would be called *harmonisation*,³²³ which in its weaker form would be called *approximation*.³²⁴ Outside of this unification-harmonisation spectrum, there is *uniformity*, meaning the creation of structural characteristics for every market segment in order to induce the coexistence of regulations competing with each other and rules that are uniformly applicable.³²⁵ Attention should be paid to the distinction between unification and uniformity, as unification refers to the replacement of national legislation by a common legislation, while uniformity refers to a uniform application of seemingly diverse rules.³²⁶ Nevertheless, uniformity still suggests the existence of diverse and competing rules, but at the same time hints at a uniform applicable structure that in a certain manner would also bring similar results.

The aforementioned terms do not have broadly accepted definitions. It should be said as well that the above definitions may appear inconsistent with other research, and therefore care should be taken in any comparison. Many academic researchers use their own working definitions, or try not to become too involved with definition technicalities. As explained in the previous paragraph, these terms are connected to each other, and create a scale that ranges from total unity of legislation to simply an approximation of it. In Section 3.3, harmonisation, unless specified, will include all the terms mentioned above. Defining these terms, however, is just a part of the problem – the processes related to harmonisation are even more challenging. The following section serves as an introduction to these difficulties.

3.3.1.2 *Difficulties in harmonising civil procedure*

The focus of this section is the relation between harmonisation and the civil justice system competition in the EU. The competition depends on the rules of civil procedure, and consequently on how their harmonisation affect competition. This section provides an overview of some of the troublesome features that every harmonisation process needs to face.

³²³ Smits (2007) 220. Andrews perceives harmonisation on two levels: first, as an adjustment of the national system to ensure compliance with the procedural guarantees contained in other international regulations; second, as a regulation introduced to ensure the pan-EU adaptation of more specific procedural institutions or practices. See Andrews (2012) 20.

³²⁴ Bellavista (2006) 10.

³²⁵ Bellavista (2006) 3; for more details, see Zoppini (2004). Smits has a more orthodox approach, and considers uniform law a consequence of the unification process. Smits (2007) 220.

³²⁶ Thiele gives a similar account of the attempts of drafters of The Hague Convention on Choice-of-Court Agreements to create safeguards regarding uniform application of the Convention, despite the multitude of applicable laws. Thiele (2007) 72.

The first aspect to be taken into account when attempting to harmonise³²⁷ civil procedure is the large number of rules that comprise it. In fact, civil procedure is composed of all the procedural rules that allow substantive law to be applied and protected. Just as there is a multitude of rules in civil law, they are overly abundant in civil procedure. These rules are greatly detailed, and in many cases are customised with regard to the necessities of how substantive law has been drafted and will be implemented. This means that procedural law is not simply a body of law that can be replaced using a single stroke of the brush. Careful consideration must be paid even to the small details that give procedures their characteristics. So again, the problem would be how to harmonise all the mechanisms assembled by the rules of procedure, the rules of court, and judicial organisation, and still guarantee the protection and application of substantive law and the functioning of institutions.

A second aspect of civil procedure that needs to be taken into account is the fragmentation of procedural rules.³²⁸ This means that rules of civil procedure are not located in only one or two legislative acts, but are scattered. A code of civil procedure can no longer contain all the related rules, and rules on court and judicial organisation are often separate. With the creation of new institutions, new substantive and procedural laws are created. Many Member States have specialised courts that require new legislation if not special procedural laws. Any harmonisation should target each of the various fragments. Given the number of Member States and the number of fragments that a harmonisation process affects, the effort needed to start and to finish a harmonisation process increases enormously.

A third aspect to consider is that procedural law has a strong national imprint. Civil procedure and the system of civil justice have been shaped and imbued with a spirit of nationalism from the moment that nationalistic movements began to spread across Europe. Codification during the 19th century was marked by a strong national pride, rooted in national culture and history.³²⁹ Nation states like France and Germany were proud of their respective civil codes, which were also reflective of the legal and social developments in those countries. England was, and still is, proud of its way of approaching civil procedure. Even countries that used the German or the French model to draft their civil codes added their own national touch, and the codes of civil procedure that followed were marked in the same way. Therefore, any group wanting to harmonise civil procedure in the EU

³²⁷ In this paragraph, as well as in the rest of this section, the term harmonisation is generic, and includes concepts ranging from unification to approximation.

³²⁸ Uzelac (2012) 185, Taruffo (2012) 218.

³²⁹ Smits (2007) 223.

would have to deal with the nationalistic feelings, texture, and mindset inherent in national civil procedures. The same reasoning can be applied to civil justice systems. Courts are an expression of the national approach to conflict resolution; over a long period, they have been shaped and imbued with national traits, and they bear many national characteristics.³³⁰ Therefore, the harmonisation of civil justice systems cannot be undertaken without first dealing with Member State courts' diverse array of nationalistic imprints.³³¹

A fourth aspect to be taken into account is the close relationship between substantive and procedural law. Because both laws are related, changing one will inevitably affect the other. Procedural law is considered as the instrument that allows the protection and enforcement of substantive law.³³² This becomes even more important if there is no other effective option to exercise and enjoy subjective rights. However, the close relationship between substantive and procedural law was not always considered important.³³³ Splitting the organisation of civil justice from civil procedure can resolve some of the problems related to that close connection as well as to that between court organisation and nationalistic imprint. However, even though this is possible, it does not resolve the problems of harmonisation. If harmonisation is to avoid trouble with regard to substantive law, a better strategy is needed to target procedural law. Changes in strategy might help, but still cannot avoid the problems.

In summary, this part highlighted some aspects of civil procedure that increase the difficulty of harmonisation in this field. The difficulty also depends on its type, depth, and intensity. The detailed nature of civil procedure along with its fragmentation and nationalistic aspect have considerable influence on the techniques and strategies selected for the harmonisation process. In the following section, the discussion continues with arguments both in favour of and against harmonisation.

3.3.2 Arguments in favour of and against harmonisation

Harmonisation is an ongoing trend in the EU, and two areas of interest for this research are procedural law and private international law, both of which are fundamental to the development of a civil justice system competition. This link between harmonisation and competition can be problematic, however, because while harmonisation and competition are praised for their benefits, their

³³⁰ Uzelac (2012) 178-179.

³³¹ It is also true that some procedures tend to become alike without losing their nationalistic imprints. This is the basis of what is called spontaneous convergence.

³³² Storme, Matthias (2012) 145; Procedural rights as protection for ordinary people, Andrews (2012) 34; Visscher (2012) 71.

³³³ Van Rhee (2012) 54.

coexistence is difficult. At some point, a choice must be made. This section provides an overview of arguments both in favour of and against harmonisation. Assessing these arguments provides more insight into the relationship between harmonisation and competition, and serves to determine which of them is more desirable.

3.3.2.1 Arguments in favour

One reason brought forward by the proponents of harmonisation is the improvement regarding the internal market. Differences in law between Member States create barriers to cross-border trade, distort the market, and discourage the creation of a single-market area.³³⁴ Differences in legislation between Member States also present legal as well as psychological barriers to active and potential traders. The harmonising of legislation would eliminate these differences and remove the barriers. The existence of obstacles does not mean that trade is not possible in the EU, but it does mean that it faces undesired difficulties.³³⁵ Legal barriers are manifested in the challenges that parties have in learning and understanding foreign law in order to conduct their business activities.³³⁶ These difficulties also increase uncertainty and costs.³³⁷ Experienced parties have already acquired some knowledge of these matters, but for newcomers, the obstacles are formidable. It can be said that these differences in law can be resolved with the help of a foreign lawyer or partner, but for small parties and individuals, these resources can be costly or not available. Persistent legal barriers can turn into psychological ones, and, as a consequence, can create a predisposition to sedentary trade and cross-border immobility. Nevertheless, it should be said that other factors create barriers as well. Most importantly, differences in language, culture, and distance between parties should be considered. However, which of these factors is the most important and influential remains to be assessed more efficiently.³³⁸

³³⁴ Smits (2007) 221; Van Rhee (2012) 50.

³³⁵ McKendrick (2006) 14. McKendrick argues that even though this is a good argument for the harmonisation of contract law, it is not a good argument for creating a single European law.

³³⁶ See also p. 4 of the proposal for the Common European Sales Law. Available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0635&from=EN>> accessed 22 December 2017.

³³⁷ Visscher (2012) 75. The Commission considered that harmonised procedures improve access to efficient justice. See p. 10 of the Green Paper 'On a European Order for Payment Procedure and on Measures to Simplify and Speed up Small Claims Litigation', available at: <<http://publications.europa.eu/en/publication-detail/-/publication/57e40e93-d701-4a25-b741-fbf37ab73648/language-en>> accessed 22 December 2017.

³³⁸ It should be said that many aspects of civil law have already been harmonised or have converged within the EU. What remains as a significant difference between Member States is procedural law and especially civil justice. Therefore, these arguments are even more

Differences in law between Member States can distort the internal market, and this distortion is reflected indirectly. In other words, differences in legislation create a variety of conditions for businesses, thus making some businesses more competitive than others.³³⁹ While the levelling of differences was the foundation of the *acquis communautaire* in civil law, it can also be the basis for the harmonisation of civil procedure. Nevertheless, the steps that lead from differences in law to market distortion to competition distortion are not evident. In this regard, a careful assessment of facts and factors relating to competition distortion needs to be made. If legal differences appear to be responsible, harmonisation is advisable.

Another argument in support of harmonisation is the creation of a European identity. The EU founding Member States wanted to create a unitary and solidary Europe to avoid conflicts like the Second World War. This could be achieved by creating common institutions and by setting aside nationalistic rhetoric and behaviour. At the same time, Member States and the EU celebrated cultural diversity within the community by using ‘united in diversity’ as the official motto of the EU.³⁴⁰ While it is debatable whether this is an ambiguity, it is true that law and in particular civil procedure are vested with a nationalistic spirit. Proponents of harmonisation suggest that the creation of a single European Civil Code or Code of Civil Procedure or even a smoothing out of differences between jurisdictions would further unite Member States, and would result in a European identity, just as the civil codes drafted in the 19th century served nationalistic goals.³⁴¹ This argument tackles legal diversity as an obstacle to European identity, and uses harmonisation as a tool to overcome it. It can be said that legal diversity is not the only obstacle to the unification of Europe or to the creation of a European identity. Economic, political, and social differences form bigger challenges. Harmonisation or legal unity will not automatically result in a single European identity.

The national identity inherent in laws often makes them unsuitable for dealing with cross-border trade and litigation.³⁴² While the legislation in some jurisdictions is ready to handle international elements, other laws or jurisdictions are not, mainly because law is often prepared, approved, and applied only on the basis of the national environment. These jurisdictions face difficulties when

important in relation to the harmonisation of civil procedure. Van Rhee (2012) 40; Visscher (2012) 76.

³³⁹ Smits (2007) 222; Visscher (2012) 76.

³⁴⁰ The EU motto <http://europa.eu/about-eu/basic-information/symbols/motto/index_en.htm> accessed 22 December 2017.

³⁴¹ Smits (2007) 223.

³⁴² McKendrick (2006) 17.

confronted with international cases. Moreover, rules of law in some instances have endemic characteristics with which foreign users are unfamiliar, and these rules are potential traps for foreign lawyers and traders, increasing uncertainty and costs.³⁴³ Harmonisation can be a solution to these problems by levelling differences or by creating uniform provision, but the difficulty is that it requires as a first step the identification of legal norms that are not suitable for cross-border transactions. The second difficulty would be to convince local communities as well as politicians to sacrifice part of their national legal system in favour of harmonised cross-border legislation. A form of harmonisation used so far to bypass these problems has been international legalisation, of which the Brussels Regime is a good example. In an increasingly integrated EU market, the Brussels Regime sidestepped national law and endemic solutions to provide individuals and traders with more legal certainty and consequently fewer costs.

Another argument in favour is an economic one,³⁴⁴ and it submits that the harmonisation of legislation would internalise externalities. Law and regulations generate costs that in many cases are not borne by the party that produces these norms, but are externalised outside the jurisdiction. In this situation, social welfare may decrease because the party that produces the laws does not bear the costs and does not respond to the decrease. However, this does not mean that the welfare of the country that produces the law declines; it is the joint welfare of the country that externalises the costs and the country that bears the costs that declines. This is an undesirable effect, and needs to be dealt with in terms of the EU situation. In this regard, harmonisation of the law would create common legislation conditions that would internalise the above-mentioned costs.³⁴⁵ The problem here is that while this resolves the problem between EU Member States, neighbouring countries would remain outside this 'solution'. And although social welfare might improve within the EU, it could deteriorate in other countries. Nevertheless, the problem of externalities might endure unless the world becomes a single jurisdiction.

In the law and economics literature, an ongoing debate is about whether a competition of jurisdictions would produce a race-to-the-bottom,³⁴⁶ meaning that competing jurisdictions reduce legal standards in order to be more attractive to customers. Obviously, reduced legal standards is a negative effect that must be avoided. The harmonisation of legislation between competing jurisdictions would

³⁴³ For examples in contract law, see McKendrick (2006) 17.

³⁴⁴ Visscher (2012) 80-84.

³⁴⁵ Before jumping to this conclusion, it should be determined whether national law can cope with this problem without the need for harmonisation.

³⁴⁶ This topic was discussed in Section 2.4.1.

indeed reduce the risk of a race-to-the-bottom, but in levelling differences it would at the same time do away with one of the premises of competition. Setting aside the discussion as to whether the race-to-the-bottom is a real risk, it can be said that even if harmonisation smooths out legal differences between jurisdictions, law implementation and enforcement will remain different.³⁴⁷ Harmonisation reduces the premises of competition (differences in law), but it does not eliminate all of them (differences in enforcement, application, language, economics, and so forth). These differences stem from a variety of extra-legal factors such as various traditions and social settings as well as cultural and economic dissimilarities.

Another economic argument in favour of harmonisation is that it reduces certain transaction costs.³⁴⁸ It should be noted that cost reduction is relative to the type of harmonisation that is pursued, and certain reductions might be more significant with specific types of harmonisation. Costs that are reduced as a consequence of harmonisation include³⁴⁹ *inconsistency costs*, which are derived from legal inconsistencies between jurisdictions; *information costs*, which are incurred in the process of learning foreign law; *litigation costs*,³⁵⁰ which are related to choosing a law or a court; *instability costs*, which are related to changes in legislation that affect a cross-border transaction; *externalities*; and *drafting costs*, which are incurred in the drafting of legislation. In the event of harmonisation, these costs would be eliminated or reduced, which would increase the parties' profit. As mentioned, cost reduction is relative to the type of harmonisation and its effectiveness. The more that harmonisation resembles unification, the more these costs are reduced. In addition, the more effective the harmonisation process, the lower the costs.

3.3.2.2 Arguments against

Some arguments against harmonisation mirror those in favour of it. Divergent law was mentioned as an obstacle to trade, which could be overcome by the harmonisation of law. Opponents of this argument point to how the UK and the US have a functional single market without having a unified legislation.³⁵¹ Therefore, although diversity in the EU should not be considered a problem, but

³⁴⁷ As discussed in Section 3.3.1.1, sometimes uniformity is also necessary to fulfil the purpose of harmonisation.

³⁴⁸ Visscher (2012) 82.

³⁴⁹ This is drawn mainly from Ribstein and Kobayashi (1996) 138-140.

³⁵⁰ Litigation and information costs can be merged rather than kept separate. What is considered a *litigation cost* is actually an *information cost*. In fact, litigating in foreign or cross-border cases only adds the cost of obtaining information abroad to the costs of litigation. This means that cross-border litigation adds mainly information costs to non-cross-border litigation.

³⁵¹ Harmonisation involves several processes that range from unification to approximation. In the US, even though commercial law is not unified, it has been approximated by the Uniform Commercial Code of the American Law Institute. McKendrick (2006) 21.

the ‘real’ problem should be found.³⁵² The core of this argument is directed against a total unification of legislation, while softer forms of harmonisation – such as approximation – might be a better solution; it would smoothen the differences between legislations but would not affect legislative diversity.

Another opposing argument exalts the virtues of diversity. Diversity of legislations within the EU allows parties in a cross-border transaction to choose the applicable law or the competent court from among several jurisdictions.³⁵³ By selecting one or the other, these parties instigate competition between jurisdictions that, in the long term, tends to improve the service offered as well as the quality of the law. In the short term, the diversity of offers enables parties to make better choices. By eliminating this diversity, the EU would lose some of its legal principles that incubate in the national systems and, when mature enough, spread throughout Europe.

Apart from these theoretical problems, some practical arguments against harmonisation can also be mentioned.³⁵⁴ First, on a practical level, Member States would be reluctant to give up their legislation in favour of one that is harmonised.³⁵⁵ Second, it would be difficult to reach an agreement on the terms or institutions that would replace the national ones. Third, even if an agreement is reached, the interpretation of the law and its application would vary.

From a law and economics perspective, harmonisation is criticised for eliminating alternatives. As mentioned previously, the more alternatives, the more choices for parties,³⁵⁶ and the more choices for parties in cross-border cases, the more they are satisfied. Furthermore, the existence of choices creates a learning process³⁵⁷ that in the long run helps in the development of new legislation, institutions, or approaches to legal problems.

Harmonisation also carries with it an information problem.³⁵⁸ First, local legislators know the problems of their community better than anyone. Some types of harmonisation would involve a common legislator for the whole EU, and as a

³⁵² The mere fact that legislation between two EU Member States differs does not mean that trade and commerce are disturbed or distorted. Smits (2007) 222.

³⁵³ McKendrick (2006) 27; for the legal framework in the EU, see Sections 3.1 and 3.2.

³⁵⁴ McKendrick (2006) 26.

³⁵⁵ For example, judicial and enforcement procedures are closely linked to sovereignty. Even in the event of harmonisation, Member States have procedural autonomy to adopt procedures that offer more protection or guarantees as compared to harmonised procedures. See Kramer (2013) 8.

³⁵⁶ Visscher (2012) 77. These arguments draw from Tiebout’s theories described in Section 2.1.4.

³⁵⁷ For the learning process, see Section 2.1.3.

³⁵⁸ Visscher (2012) 78.

result would increase the distance between voters and law makers. While maintaining variations, the diversity of legislation maintains a closer contact between voters and law makers. Second, law makers tend to serve a general interest when approving laws and regulations. In the case of harmonisation, the law-making power would tend to be concentrated in a few hands, and thus be vulnerable with regard to powerful lobbying groups, which do not always further consumers' interests. In a non-harmonised Europe, these lobbying groups have a hard time coordinating their efforts in all the Member States, which is a benefit for consumers. Third, as mentioned above, harmonisation confers competitive advantages on some companies by allowing them to choose substantive or procedural law according to their needs. These companies would be reluctant to lose their advantage. Such an argument of course does not hold for all the companies and for all the Member States, but in the field of civil procedure it might be true for law firms that rely on the differences between jurisdictions in order to conduct their business. These law firms would be the first to object to harmonisation if they sensed any danger to their already established competitiveness.

3.3.3 On harmonisation processes

In Sections 3.3.1 and 3.3.2, a general introduction to harmonisation and some arguments both in favour of and against it were presented. It was submitted that varying intensities require different approaches to achieve harmonisation. In this section, some of the means of achieving harmonisation are discussed.

Harmonisation processes can be divided into two groups based on the presence of a designer or a guide. This guide or designer can be a special commission, an international organisation, a group of institutions, or even a person powerful enough to coordinate and conduct such a process. The first group is composed of processes that require a guide or a designer to organise and to apply, or to implements and to regulate the harmonisation process. And that guide or designer would need to be well aware of the harmonising mission and its accompanying responsibilities. This awareness is crucial, because it enables the guide to distinguish the process from the incidental harmonisations of the second group. The group of guided processes includes harmonisation through international conventions, through European regulations or directives, through the creation of common legislation, through soft law, and through the production of minimal standards.

The second group is composed of processes that lack a guide or a designer. They are spontaneous, they lack schedules and deadlines, and they do not guarantee harmonisation. Included in this group are the creation of an *ius commune*, and harmonisation through the drafting of legal principles, by way of cross-

fertilisation (influences between jurisdictions), and derived from the competition of jurisdictions.

Some of these processes have elements of both groups, which increases the difficulty of categorising them. This is mentioned where appropriate during the analysis. In the following sections, these processes will be discussed with a focus on the harmonisation of civil procedure in the EU. This section introduces how competition can create harmonisation, and how harmonisation can suppress competition. Section 3.3.5 expands on this topic, with the competition of civil justice systems as its focus.

3.3.3.1 Guided harmonisation processes

Guided harmonisation processes are planned, directed, and executed by an individual, by a group of people, or by an institution, whose purpose is to harmonise the law in a specific field. These processes are the most recognisable and the most widely used. They are generally planned, and have schedules, deadlines, and a final goal. Some of these procedures are discussed in the present section.

International treaties have long been used to legally regulate relations between two or more countries. While checking each other's behaviour, contracting states can agree on common legislation to be applied equally in their jurisdictions. An example of harmonisation of private international law through treaties and conventions is the Hague Conference on Private International Law (the Hague Conference). The Hague Conference works for the unification of private international law rules, and more than thirty conventions have been drafted under its auspices. The problem with these kinds of harmonising instruments is that they require a complicated mechanism to enter into force. Member States ratify and make them applicable in their own jurisdictions at different times. In many instances, a treaty tends to be based on a legal system that many other states are unwilling to ratify, or, if not based on a legal system, the treaty is likely to be vague and too general to have a unification effect.³⁵⁹ Another weak point is the absence of a higher court to guarantee the uniform interpretation of the treaty or convention. Despite these drawbacks, however, treaties and conventions are the best way of reaching quick and global legal uniformity.

In the EU, treaties and conventions have been replaced by directives and regulations, which are different in approach but similar in results. On the one

³⁵⁹ Smits (2007) 224; the same conclusion was reached regarding the European Code of Conduct for Mediators: Nylund (2014) 37.

hand, regulations directly unify a certain legal aspect.³⁶⁰ On the other hand, directives give the general guidelines and aim of the process, while leaving the Member States to change national legislation according to their needs.³⁶¹ The main advantage of directives is that they leave to Member States the possibility of adapting local legal terminology, structure, and setting to the needs of the directive. This is also a disadvantage of directives, in that the lack of uniformity in terminology in the structure of institutions and in legal settings makes it hard to distinguish the effects of harmonisation, which through these instruments tends to be fragmentary and arbitrary. It is fragmentary because directives harmonise not only an entire field of law but specific aspects as well. It is precisely this ‘fragmentation’ that creates an idea of arbitrariness. One might ask why one thing needs a European regulation while another does not.

Arbitrariness and fragmentation would be better resolved by adopting a common legislation that would harmonise and unify laws or procedures at the same time. There have been ideas of creating a European Civil Code³⁶² or a European Code of Civil Procedure,³⁶³ but any attempt to harmonise civil procedure in Europe would inevitably affect rules on choice of law. Harmonisation of rules on choice of law and civil procedure have moved in different directions. Rules on choice of law have been characterised by attempts to coordinate the legal system of Member States, aiming at the free movement of judgments and litigants: for example, the Brussels I or the Rome I Regulations. At the same time, international civil procedure has been characterised by genuine attempts to harmonise the legislation of Member States: for example, the European Order for Payment³⁶⁴ Procedure and the European Small Claims³⁶⁵ Procedure.³⁶⁶ Some of these instruments are characterised both by the coordination and the harmonisation of legislation: for example, the European Enforcement Order for Uncontested Claims.³⁶⁷

³⁶⁰ Article 288 of TFEU. *Treaty on the Functioning of the European Union*, OJ C 326, 26.10.2012, p. 47–390.

³⁶¹ The legal basis for the harmonisation of civil procedure in the EU is discussed in Section 3.3.4.

³⁶² Alpa (1999) 11.

³⁶³ Smits (2007) 226, Nylund (2014) 42.

³⁶⁴ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1–32.

³⁶⁵ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1–22.

³⁶⁶ Kramer (2012) 123.

³⁶⁷ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15–39.

Instruments that have both characteristics tend to introduce ‘minimum standards’.³⁶⁸

Another harmonisation trend in the EU is the introduction of minimum standards for civil procedures. As Kramer (2012) demonstrates, several regulations approved in the last ten years have introduced minimum procedural standards for all the Member States.³⁶⁹ In the Stockholm Programme, the European Council considered minimum standards important in improving the effectiveness of the Union’s instruments.³⁷⁰ Minimum procedural standards can serve as a first step towards more prominent harmonisation processes, and they offer certain benefits related to their harmonisation effects. First, they avoid the danger of a race-to-the-bottom or the risk of social dumping.³⁷¹ Second, they do not eliminate the diversity of legislation.³⁷² This gives national legislators space to manoeuvre in order to change and to experiment as long as legislation is above the minimum standards. Experimentation or legal diversity promotes legal progress by introducing new solutions to legal problems. Third, maintaining national identity and allowing differences above the minimum threshold makes it possible for the competition of jurisdictions to develop.

Nevertheless, there are negative sides to achieving harmonisation through minimum standards. First, some of the problems such as differences between legal systems and legal fragmentation will persist. This process, while levelling the minimal procedural guarantees, does not deliver true harmonisation. Second, it might be difficult to agree on what to consider a minimum standard, as Member States have differences in civil procedures that can be reflected in their approach. Minimal procedural standards that are higher than national minimal standards can be a budgetary burden for some Member States, and they will either reject the standards or simply not apply them. Setting minimum standards too low would make the reform unnoticeable for Member States employing high standards, although the positive side-effect would be that these sets of minimum standards would create a basic level across the EU, which would increase legal certainty for cross-border players.³⁷³ Third, creating a set of minimum standards might cause

³⁶⁸ For example, the European Enforcement Order Regulation includes a set of minimal standards from Articles 12-19.

³⁶⁹ Kramer (2012) 128.

³⁷⁰ The Stockholm Programme — An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, p. 1–38.

³⁷¹ Social dumping was discussed in 2.3.3. See Bellavista for the relationship between competition and harmonisation and social dumping. Bellavista (2006) 7-13.

³⁷² Vernadaki (2013) 309.

³⁷³ It should be said that the European Convention on Human Rights offers some procedural guarantees. Although these are against the abuses of governments or state agencies, they can

the harmonisation process to become lethargic. After agreeing on a minimum standard, the drafters and the Member States might feel content with the solution and be unwilling to take further steps. In any case, in light of what has already been said, there is no real formula for success where harmonisation is concerned; thus, attempting it by way of a variety of methods in different directions seems a reasonable approach. After all, learning by failing has always been an effective teacher.

3.3.3.2 *Spontaneous harmonisation processes*

Processes of guided harmonisation make up one group, while the other is composed of spontaneous processes, the characteristics of which are the absence of a guide or designer, the lack of a plan or schedule, and random results. One of the producers of spontaneous harmonisation is the competition of jurisdictions.³⁷⁴ This is important, as it directly connects the competition of civil justice systems to the harmonisation of civil procedure in the EU. Moreover, it shows that this competition has a harmonising function. This section discusses some of the spontaneous processes that lead to harmonisation.

One process is the revival of *ius commune*, a law or set of laws that were recognised and applied in a more or less uniform way across Europe in the 17th and 18th centuries. *Ius commune* was developed by legal scholars on the basis of Roman law, and was adapted to the needs of mediaeval and post-mediaeval Europe. The idea of the modern *ius commune* is to create the same process, environment, or phenomenon in the present time. This task is in the hands of academics who will propagate the law and teach it. It does not have a guide but is simply an ideal for all of Europe to follow: an *ius commune*. It sounds more romantic³⁷⁵ than realistic, but some points here are worth considering. It is true that to have a harmonised civil procedure, law students need to be trained differently: namely, with a spirit of nationalism but also with a European spirit that will make them more inclined to accept and to promote a common European law, an *ius commune*. Furthermore, they should be trained on the basis of similar curricula and a common programme as well as in the same legislation and principles. Achieving this is not simple, however, because universities respond to the needs of the market, and if the market requires local lawyers, then the curricula must focus on national law rather than on general abstract European law. Another problem is the historical and social context. The historical *ius commune* was

serve either as a set of minimal standards or as a basis for harmonisation. For more, see Van Rhee (2012) 50-51; Kramer (2012) 136; Hess (2012) 196-171.

³⁷⁴ Van den Bergh (1998) 138-139; another term used is 'spontaneous convergence'; see Visscher (2012) 78; Ogus (1999) 415.

³⁷⁵ Or mythical, as Vogenauer calls it; Vogenauer (2006) 1.

developed from Roman law and in situations where alternatives were not available. Furthermore, *ius commune* was a scholarly tradition that was applied and perceived in different ways. In the current modern context, *ius commune* would be in competition with national law and perhaps with other international legislation. Nevertheless, the progress in academic cooperation, exchange, and initiatives would only work in favour of an approximation of European legislation. The time and speed of this approximation would be hard to estimate, but as Smits³⁷⁶ demonstrates – and as witnessed during the course of this study at the *Ius Commune Research School* – there is no shortage of willingness.

Another type of spontaneous harmonisation is the drafting of principles of law, a process that falls into the grey area between guided and spontaneous (non-guided) harmonisation. It can be considered guided because there is always a group of people or institutions that draft the principles. It can be considered non-guided because for some of the groups their aim is not the harmonisation of legislation. Examples like the Principles of European Contract Law (PECL), the Principles of European Trust Law, European Insolvency Law, and European Tort Law have shown that, at least for academics, a common legislation for Europe can be agreed upon. As well as the name, these principles contain detailed legal provisions that can be used as an applicable law for contracts if parties choose to do so. An example of drafting principles in civil procedure is the project developed by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT).³⁷⁷ The project entitled Principles of Transnational Civil Procedure is aimed at creating a common set of civil procedure compatible with common and civil law traditions.³⁷⁸ It resulted in the homonymous set of principles that include, among others, guarantees regarding fundamental procedural rights, guidelines on the process, and so on.³⁷⁹ Even though the drafters intended the principles to be used for cross-border cases, they can be applied in a purely national context, as well as a best practice or model for drafting legislation.³⁸⁰ A similar project is also the European Law Institute (ELI) and UNIDROIT collaboration, which aims at developing further the ALI-UNIDROIT

³⁷⁶ Smits (2007) 229-231.

³⁷⁷ The Report prepared by Marcel Storme on the Approximation of Judiciary Law in the European Union (1994) is one of the first attempts to create a set of common procedural rules in Europe. The aim of this paragraph is to give an example of the drafting of a civil procedure. Being more recent, the ALI-UNIDROIT Principles are a better example.

³⁷⁸ Text of the Principles with commentary from the UNIDROIT website: <<http://www.unidroit.org/instruments/transnational-civil-procedure>> last accessed 22 December 2017.

³⁷⁹ For this, see Andrews (2012) 20-35.

³⁸⁰ See commentary to the ‘Scope and implementation’ of the Principles at <<http://www.unidroit.org/instruments/transnational-civil-procedure>> last accessed 22 December 2017.

Principles for Europe by establishing European Rules of Civil Procedure.³⁸¹ From the EU point of view, these principles can be used as a basic model law for a common civil procedure. The success of these principles depends on many factors, the most recognisable of which are political climate, reputation of the drafting team, and the needs of the market.

Another type of spontaneous harmonisation emerges when jurisdictions influence each other. This means that a legal norm is developed, applied, and reaches maturity in one jurisdiction, and after gaining international recognition, it is implemented in other jurisdictions. Usually this does not result in exact copies, but in ones that are adapted to local juridical settings.³⁸² This explains why so many legal instruments across Europe are similar to each other.³⁸³ Spontaneous approximation of this type can be very natural, and is usually the outcome of the social, economic, and legal needs of the 'receiving' jurisdiction. Being driven by these needs, this kind of harmonisation is able to change even fundamental parts of legislation. This is also important from the economics point of view, since legislative changes are made at the right moment and they target the exact needs of the system. The problem with this kind of spontaneous harmonisation is that it is often described as an automatic mechanism that solves legislative problems at the moment they mature. This means that if a jurisdiction needs a mechanism to regulate a particular aspect of civil procedure, it will either create it or be fertilised by cross-border experiences. It is more likely that this kind of harmonisation also has obstacles similar to those relating to guided harmonisation. Given that it is not a guided process, spontaneous harmonisation can be chaotic. As a consequence of its spontaneity, it does not have any time schedule, and therefore it might take some time before harmonisation is achieved anywhere. From a historic point of view, it can be argued that until the end the Second World War no serious attempt to guide harmonisation was made. Spontaneity had reigned in Europe since Roman times, and as can be seen, legislation in Europe is not harmonised but is diverse in procedures and provisions. It can be argued that certain institutions and legal provisions are the same across Europe thanks to spontaneous harmonisation,

³⁸¹ More information on the webpage of UNIDROIT at <<http://www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure>> last accessed 22 December 2017. The webpage of ELI at <http://www.europeanlawinstitute.eu/projects/current-projects-contd/article/from-transnational-principles-to-european-rules-of-civil-procedure/?tx_ttnews%5BbackPid%5D=137874&cHash=30981e5bc9618fbff47b45f915463642> last accessed 22 December 2017.

³⁸² Some examples of institutions that have been developed in one country and have spread to others can be found in Van Rhee (2012) 44-46.

³⁸³ The other explanation would be an independent development and convergence of legal instruments. While the result of these processes is the same, their source is different. It is therefore difficult to assess a process only on the basis of its results.

but legal diversity is also a result of this spontaneity. To conclude, it can be said that rather than relying entirely on spontaneous harmonisation, it can be used in situations where satisfactory results can be achieved and discouraged where they seem uncertain.

3.3.4 Legal bases of the harmonisation of civil procedure in the EU

This section is dedicated to the legal bases used to harmonise civil procedure through Regulations and Directives.

The harmonisation of civil procedure can be organised on several levels. At the international level, the ‘methods’ mostly used are soft law and international agreements,³⁸⁴ which can also be applied at the regional level to include only a limited number of jurisdictions. Nevertheless, aspiring EU Member States are very active in harmonising and approximating their legislation with EU directives and regulations, and this spill-over effect slightly increases the legislation’s territorial impact in Europe. However, this theme is beyond the scope of the present section, and requires further scrutiny and analysis in another study.

In the EU, harmonised civil procedure rules have been based on Articles 81 and 114 of the TFEU. Legislation based on Article 81 (ex. Art. 65 EC Treaty) has a cross-border character, while legislation approved based on Article 114 (ex. Art. 95 EC Treaty) is also applicable to purely national cases.³⁸⁵ Article 81 gives the European Parliament and the Council the right to approve legislation that ensures the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; the cross-border service of judicial and extrajudicial documents; the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; cooperation in the taking of evidence; effective access to justice; the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; the development of alternative methods of dispute settlement; and support for the training of the judiciary and judicial staff. In this context, Article 81 provides the legal basis upon which to harmonise ‘classical’ private international law instruments, as well other ‘modern’ mechanisms. Classical instruments with a legal basis in Article 81 are the Brussels Regime Regulations and the Rome Regime Regulations. Modern instruments with a legal basis in Article 81 deal with topics such as cross-border

³⁸⁴ Kramer and Van Rhee (2012) 2.

³⁸⁵ Kramer and Van Rhee (2012) 3.

debt recovery,³⁸⁶ mutual recognition of protection measures in civil matters,³⁸⁷ procedures in cases of divorce or separation,³⁸⁸ and jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,³⁸⁹ and so forth.³⁹⁰ Since 2000, at least fifteen regulations have been approved on the basis of Article 81 (ex. Art. 65 EC Treaty). This rhythm of almost one regulation per year shows that the EU considers harmonisation an important instrument in developing a stronger Union. Regulations approved in this spirit are applicable not only in cross-border cases but also in dealing with particular and specific details of civil procedure, and they are designed to overcome procedural problems relating to Europe's increasing political and social unification.

The problems with using Article 81 as the legal basis for harmonising civil procedure in Europe are its limited subject matter and its limited impact.³⁹¹ Article 81 provides the possibility of approving common rules only for cross-border civil cases. This means that national cases are not resolved using a harmonised civil procedure but with national procedures. While limiting the scope of EU Regulations, this situation creates a national conservatism that is difficult to shed. The image derived is that of a frequently implemented national procedure that is replaced in rare cases (cross-border cases) with an EU procedure. The risk here is that rarely used regulations based on Article 81 will become outdated and be viewed with diffidence. Of course, this is related to the other problem of harmonisation based on Article 81: namely, limited impact.³⁹² As mentioned above, having a limited impact results in fewer cases, and therefore the law does not develop. Limited usage would leave any regulation to gather dust, and parties would be less likely to apply it. Nevertheless, it can be argued that the best way to harmonisation would be to create procedures equally applicable for domestic

³⁸⁶ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59–92.

³⁸⁷ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181, 29.6.2013, p. 4–12.

³⁸⁸ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10–16.

³⁸⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

³⁹⁰ Kramer (2012) 126. See also Kramer, De Rooij, Lazić, Blauwhoff, and Frohn (2012) 17–19.

³⁹¹ Wagner proposed other limits to the potential of Article 81. See Wagner (2012) 97–101.

³⁹² See gives a brief account of the limited application of the Regulations based on Article 81. See; Hess (2012) 162.

and commercial cases, thus resulting in a uniformity of procedures and avoiding inconsistencies between cross-border and national cases.

Another article has been used as a legal basis for the harmonisation of civil procedure. Article 114 of the TFEU (ex. Art. 95 of the EC Treaty) empowers the EU to harmonise national procedural law in the event that it is not adequate to implement substantive EU law. In this regard, the real aim of Article 114 is not to harmonise civil procedure but to establish a functioning internal market. The harmonisation of civil procedure is a by-product that helps to overcome the limits of Article 81. This is counter-intuitive considering that Article 114 is older than Article 81, but until recently it was rarely used for procedural aspects. In the current situation, Article 114 empowers the EU to regulate and harmonise substantive and procedural law for specific sectors, and even for purely national cases. This means that the EU can dig deep into the legislation of Member States, and harmonise it across Europe.³⁹³

Articles 81 and 114 serve as legal bases for the adopting of harmonised legislation applicable to all Member States. In the event of difficulties in reaching an agreement, it is possible for Member States to use enhanced cooperation, an instrument provided by Articles 327-334 of the TFEU (ex Art. 27a-27e, 40-40b, and 43-45 TEU). This instrument allows a group of Member States to adopt regulations applicable only to this group, and the procedure was designed to prevent individual Member States from blocking legislation proposals. Proposals following the enhanced cooperation procedure should in any case comply with the Treaties and the Union law. As such, enhanced cooperation serves as the legal basis for some partial-territory harmonisation, which means that this kind of harmonisation is limited to the Member States that take part in it. The Rome III Regulation,³⁹⁴ for example, is a regulation that was approved using the enhanced

³⁹³ Wagner labels harmonisation through Article 81 as horizontal, and harmonisation based on Article 114 as vertical. See Wagner (2012). From a different perspective, horizontal harmonisation is similar to what has been called functional harmonisation, which is directed at eliminating the distortions of competition and strengthening the market. Vertical harmonisation is similar to what has been called cohesive harmonisation, which aims at correcting the market by imposing common rules on all Member States. Functional and cohesive harmonisations, where the former is the weakest method, are forms of positive integration, which is a regulative intervention that respects the social values of Member States. In contrast, negative intervention destroys all obstacles to the development of the internal market without taking into account the social values of Member States or the benefits associated with the competition of jurisdictions. Therefore, unitary and sustainable EU legislation can be achieved only with positive integration in its strongest version. See Bellavista (2006) 10-11; Caruso (2007) 14.

³⁹⁴ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10–16.

cooperation procedure. Despite the room for technical advantages that enhanced cooperation offers, its use for harmonisation might face further challenges, one of which would be to prevent Member States becoming entrenched in a camp populated both by cooperating and non-cooperating Member States.³⁹⁵ On a positive note, enhanced cooperation is still an affordable instrument for furthering harmonisation goals and finding legal solutions to EU-related problems.

To recapitulate, in principle the harmonisation of civil procedure is based on Articles 81 and 114 of the TFEU. Article 81 sets some limits on the powers of the EU to harmonise. These powers are limited to cross-border civil cases, which means that regulations based on them have limited impact and limited potential for development. Some of the limits of Article 81 are lessened by the provisions of Article 114, which allow the EU to harmonise procedural rules of Member States if they are not suitable for the application of EU substantive law. Furthermore, Article 114 gives the EU the possibility of harmonising the substantive and procedural law of an entire sector. This might be a more substantial contribution to the integration of Member States and to the creation of a single legislation. In addition to Articles 81 and 114, Article 329 enables a group of Member States to adopt legislation applicable only to them through an enhanced cooperation procedure. While harmonisation through an enhanced procedure does not cover all the Member States, it provides an opportunity to explore legal possibilities and push harmonisation forward.

3.3.5 Competition of civil justice systems and harmonisation in the EU

Section 3.3.1 introduced certain notions related to harmonisation, as well as aspects of civil procedure that have to be taken into account during harmonisation in the EU. Section 3.3.2 mainly discussed arguments both in favour of and against competition, while Section 3.3.3 discussed methods of approaching harmonisation. These methods can be divided into two groups: one with harmonisation methods that are guided and the other with methods that are spontaneous (not guided). Competition of jurisdictions in general and the competition of civil justice systems in particular fall into the second group. This section discusses how the competition of jurisdictions can lead to the harmonisation of civil procedure in the EU.

3.3.5.1 *Competition and harmonisation*

The competition of jurisdictions is a process whereby two or more jurisdictions try to attract as many ‘legal consumers’ as possible. These are legal or natural persons that make use of the law for their commercial or non-commercial

³⁹⁵ Kramer, De Rooij, Lazić, Blauwhoff, and Frohn (2012) 86-87.

activities, and are therefore interested in making a choice of law. In many cases, the competition of jurisdictions is focused only on one specific field of law like civil procedure, company law, or labour law. Even within these fields of law, competition can be focused on one particular element, like the fact the competition of civil justice systems is part of the competition of civil procedural law. Moreover, different elements from diverse fields of law can be combined to create a specific field of competition. Libel and libel tourism are a good example of how the combination of civil procedures and substantive law creates a competition of jurisdictions.³⁹⁶ However, ‘libel tourism’ and libel suits are not what jurisdictions are seeking to attract. This example shows that jurisdictions sometimes enter unwillingly into competition with each other, or at least are treated by legal consumers as competing products. In the competition of civil justice systems, choosing a jurisdiction that offers a ‘torpedo’ can be comparable to the above example. A ‘torpedo’ refers to a suit filed in a jurisdiction famous for its slow handling of files or for delays in the judgment of cases. The infamous ‘Italian torpedo’ is well known, even though in specific cases other ‘torpedoes’ can be more devastating. Competing countries base their competitiveness on, among others, the efficiency of the judiciary, the clarity of their law, the professionalism of their judges, low judicial fees, and swift case management. If allowed, legal consumers choose from among the available jurisdictions as if they were shopping: hence the term ‘forum shopping’ that is used to describe the activity of picking and choosing between jurisdictions. In order for competition to exist, legal consumers should be mobile, be fully informed about competing jurisdictions, and be able to choose.³⁹⁷ Legal consumers are heterogeneous, composed of different categories of persons having varied interests. Moreover, their interests are relative to their position in the case. Claimants have different interests compared to defendants; frequent users of the court have interests different from occasional users; and rich and professional parties do not have the same interests as parties who are not in this category. The heterogeneity of legal consumers makes it difficult for competing countries to establish which part of the legislation is important to specific groups.

As discussed in Chapter 2, the competition of jurisdictions in general and of civil justice systems in particular has been described as having negative effects on competing jurisdictions. First, the competitions initiate and encourage a race-to-the-bottom, whereby competing jurisdictions relax their legal protection for vulnerable parties and decrease the quality of their legislation.³⁹⁸ Second, the competitions lead to ‘social dumping’, a process observable mostly in the

³⁹⁶ Klein (2011), Crook (2010), Berlins (2004).

³⁹⁷ For more, see Section 4.1.

³⁹⁸ See Section 2.4.1 on this topic.

competition of labour law. It occurs when a jurisdiction's qualified and competent workforce moves to a jurisdiction that offers better legal protection, thereby impoverishing the quality and competence of that workforce's home jurisdiction.³⁹⁹ Third, 'quality dumping' occurs, which is similar to the social dumping effect. In these instances, cases and legal disputes move and are concentrated in a few jurisdictions that end up gaining far more experience and knowledge, while other countries fall behind, and their legislation makes no progress.

Positive aspects of the competition of jurisdictions include the following. First, 'knowledge accumulation', whereby competing jurisdictions create new provisions and explore novel solutions in order to win. By creating and experimenting in several directions, they generate information leading to knowledge that helps in the development of law and legal science.⁴⁰⁰ Second, competition creates incentives for the development of law.⁴⁰¹ Competing jurisdictions would try to develop their legislation in order to keep up with their competitors. Third, competition creates a plurality of options for legal consumers, and therefore satisfies a number of their requirements.⁴⁰² In view of these negative and positive aspects, it can be said that competition is either shunned or promoted by those that are either suffering from or gaining from it. The competition of civil justice systems in the EU also faces the same predicament: some warn against its dangers while others praise its benefits.

The competition between jurisdictions could result in the spontaneous harmonisation of legislation, and, if taken to the extreme, it would produce a winner. Given that all legal consumers would prefer this winning jurisdiction, a unitary law would emerge in practice. Most probably this extreme scenario would be interrupted by the activity of other competing jurisdictions that would change their legislation and offer laws that were the same as or more attractive than those of the winning jurisdiction.⁴⁰³ This would eventually lead to a levelling of the legislation if not a unification of the law: namely, a strong form of approximation. However, there are difficulties in practice. Legal consumers are not totally mobile, as this mobility is limited by legislation, and their ability to choose is legally limited to a few types of cases. Moreover, law makers would be reluctant to copy the laws of another jurisdiction. As previously mentioned, civil procedure has strong nationalistic imprints, and law makers would be reluctant to change this.

³⁹⁹ Social dumping and competition in labour law were discussed in Section 2.3.3.

⁴⁰⁰ Visscher (2012) 78. For more, see Sections 2.1.2 and 2.1.3.

⁴⁰¹ Andrews (2012) 25.

⁴⁰² This is connected to Tiebout's theory, as discussed in Section 2.1.4.

⁴⁰³ Smits (2007) 235.

Finally, the information available to legal consumers is not always enough to facilitate a correct choice, thus limiting their ability to choose jurisdictions and to influence competition.

If competition between jurisdictions can produce a harmonisation of civil procedure, one might wonder why law is not harmonised at that moment. First of all, harmonisation based on the competition of jurisdictions is spontaneous, meaning that there is no schedule, no timeframe, and no guarantee of success, which is exacerbated by the lack of a guide and of a specific objective. Second, harmonisation needs ‘healthy’ competition, with few or no legal restrictions, and with many facilities for legal consumers to choose among, along with more mobile consumers. In Europe, this possibility has long been absent. Third, competition needs time to produce harmonisation. While competition in other fields of law may be old, competition involving civil justice systems in the EU is relatively new, and is related mainly to the development of the Brussels Conventions/Regulations. Fourth, in the competition of civil justice systems, harmonisation can occur only if the balance of cross-border cases and national cases were to lean towards cross-border cases.⁴⁰⁴ Considering that cross-border trade and commerce has intensified only in recent years, national cases are still more numerous and economically more significant. Fifth, harmonisation produces the right results only when all its necessary conditions are met. If any of the required conditions are missing or are not fully developed, competition will not flourish to full capacity, and the harmonisation will be distorted.

3.3.5.2 Harmonisation and competition

As mentioned earlier, harmonisation has different shades that denote the varied intensity of legal unification,⁴⁰⁵ and they have diverse consequences for the competition of civil justice systems in the EU. The first and most intense form of harmonisation is unification. A unified civil procedure would remove parties’ choice options, and thereby bring an end to competition. Patent law is a good example of this. As with many legal rules, patent law and litigation varied among

⁴⁰⁴ This can be an economic or a numeric balance, or a combination of the two. The economic balance leans toward cross-border cases when they provide more economic benefits compared to national cases. In this instance, national governments would try to attract these cases, enter into competition, and attempt to emulate the foreign legislation that is preferred by cross-border legal-consumers. Numeric balance means that governments may be interested in the outright difference between national and cross-border cases. If cross-border cases are more frequent than national cases, governments would compete and emulate the legislation of the jurisdictions that are preferred during competition. A combination of these two factors is also possible. It should be kept in mind that the balance is relative for every jurisdiction. The same differences between national and cross-border cases can be significant for a jurisdiction, while for other jurisdictions it is less so.

⁴⁰⁵ Unification, convergence, harmonisation, and approximation. See Section 3.3.1.1.

EU Member States, some of which were in competition with each other in terms of attracting disputes related to patent law. Germany and the Netherlands had highly specialised courts to deal with such cases. With the enforcement of the single market and the promotion of the EU as a leader in the development of science and technology,⁴⁰⁶ the protection of patents became an important issue. To ensure a uniform protection of European patents, the EU started a process of harmonisation of patent law that consists of three elements:⁴⁰⁷ first, adopting regulation 1257/2012⁴⁰⁸ on a unified European patent; second, adopting regulation 1260/2012⁴⁰⁹ on language problems regarding European patents; and third, agreeing on the creation of a unified patent court.⁴¹⁰ The last element is the most important as regards the competition of civil justice systems, because it creates a single procedure and a single court system for patent-related cases involving the signatory members.⁴¹¹ While avoiding proceedings in front of national courts, parties can have decisions from the unified courts, and these are recognised and enforceable in every Member State signatory of the Agreement. The establishment of this court will remove any rivalry and competition between jurisdictions. At the moment, however, the results of this reform cannot be foreseen. Only time will tell whether competition in patent law will have disappeared.

Other and less radical forms of harmonisation are *convergence* and *harmonisation*. These forms do not produce a sole unitary legal regime, but try to create as many unified pieces of legislation as possible. As explained above, several attempts have been made to harmonise certain parts of civil procedure in the EU. Some, like the Brussels Regulations, have been beneficial to the competition of civil justice systems by providing better legal bases for the choice of court in cross-border cases. Before the Brussels Regulations, it was difficult to manoeuvre amidst the innumerable private international law conventions.

⁴⁰⁶ See for example the programme *Europa 2020*: <http://ec.europa.eu/europe2020/index_en.htm> accessed 22 December 2017.

⁴⁰⁷ Bently and Radauer (2014) 127.

⁴⁰⁸ Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, p. 1–8.

⁴⁰⁹ Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, p. 89–92.

⁴¹⁰ Agreement on a Unified Patent Court, OJ C 175, 20.6.2013, p. 1–40.

⁴¹¹ The courts of first instance are located in London, Munich, and Paris, while the court of appeals is located in Luxembourg. The courts will begin their function four months after the Agreement has been ratified by at least 13 Member States. The status of the ratification process can be followed at <<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013001>> accessed 22 December 2017.

Furthermore, the Regulations facilitated the free movement of judicial decisions and their recognition and enforcement. In other words, they fertilised the soil for the development of the civil justice system competition. It seems a paradox that the same process (harmonisation) can, on the one hand, eliminate the competition of jurisdiction, and, on the other hand, can fuel it. In view of this, it can be said that if convergence and harmonisation increase in intensity, they might be just a step away from stopping competition, but if they are not intense, they might favour the competition of jurisdictions.

A third and less intense shade of harmonisation is approximation, which is generally geared towards having the same legal results with different laws and legal systems. This approach leaves legal provisions and procedures in Member States virtually untouched. Approximation has a dual nature, in that it can be both guided and spontaneous. Spontaneous approximation happens when two or more jurisdiction have similar institutions and provisions for the same result. For example, the provision of Article 27(4) of the Brussels Convention has been deleted from the Regulations on the grounds that the area it covers was gradually being approximated.⁴¹² Another example is the increase in the powers of management being conferred on judges, as is observed in many European countries.⁴¹³ Guided approximation needs the presence of an institution or person that will navigate the process to the required result. Attempts to promote the approximation of civil procedure in Europe were made by a group of researchers led by Marcel Storme.⁴¹⁴ Although the group's proposals for a common European code of civil procedure never materialised, the approximation idea prevailed. Examples of approximating directives adopted by the EU include the directive concerning the approximation of the laws of the Member States relating to the classification, packaging, and labelling of dangerous preparations;⁴¹⁵ the directive on the approximation of the laws of the Member States concerning liability for

⁴¹² Article 27 (4) provided grounds for the refusal of recognition of judgments in the event of differences in status or in the legal capacity of natural persons. In the Brussels I Regulation proposal, the Commission argues that Article 27(4) can be omitted because, among others, the legislation of Member States is being approximated. See Commission Proposal COM (1999) 348 final; reported also by Francq (2016) 874.

⁴¹³ Van Rhee (2012) 44.

⁴¹⁴ Storme (1994).

⁴¹⁵ Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations, and administrative provisions of the Member States relating to the classification, packaging, and labelling of dangerous preparations, OJ L 200, 30.7.1999, p. 1–68. This directive was replaced by Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on the classification, labelling, and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, OJ L 353, 31.12.2008, p. 1–1355.

defective products;⁴¹⁶ the directive on the approximation of the laws of the Member States relating to the labelling, presentation, and advertising of foodstuffs for sale to the end consumer;⁴¹⁷ and the directive for the approximation of the laws of the Member States concerning consumer credit.⁴¹⁸ In these cases, legislation in each Member State still has a nationalistic aspect, and reflects that jurisdiction's social, economic, and legal development. While approximation leaves some diversity intact among Member States, it does not appear to be an obstacle to the competition of civil justice systems.

In conclusion, it can be said that harmonisation taken to the extreme would tend to weaken and silence the competition of civil justice systems, whereas less intense forms of harmonisation could have a stabilising effect on competition and support its development. A symbiosis between harmonisation and competition might reconcile those praising the benefits of harmonisation and those lauding the benefits of competition. Furthermore, competition and harmonisation are not necessarily in conflict with each other; just as a competition of jurisdictions can produce harmonisation, harmonisation can produce a competition of jurisdictions. It is simply a matter of how to design a harmonisation process that respects the competition of jurisdictions and takes advantage of its benefits.

3.4 Conclusions

Chapter 3 aimed at providing an overview on choice of court and choice of law possibilities in the European Union, as well as on the interaction between the civil justice system competition and harmonisation. Choice of court (Section 3.1) and choice of law (Section 3.2) provided the legal framework for the competition of civil justice systems in the EU. Section 3.3 focused on the analysis of the connection between harmonisation and the civil justice system competition.

In the EU, choice of court, as well as the recognition and enforcement of judgments in civil and commercial matters, is regulated by the Brussels I (recast) Regulation. The recast Regulation is the continuation of the Brussels Convention and the Brussels I Regulation, which bequeathed it a rich body of clarifying case

⁴¹⁶ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7.8.1985, p. 29–33.

⁴¹⁷ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of Member States relating to the labelling, presentation, and advertising of foodstuffs for sale to the end consumer, OJ L 33, 8.2.1979, p. 1–14.

⁴¹⁸ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations, and administrative provisions of Member States concerning consumer credit, OJ L 42, 12.2.1987, p. 48–53.

law and principles. Section 3.1.3.1 analysed some of the most important principles enshrined in the recast Regulation. These principles are party autonomy, mutual trust, autonomous interpretation, *forum non conveniens*, and *lis pendens*. Mutual trust requires not only a free movement of people, services, and goods but also court decisions. The recast Regulation abolished the exequatur provisions for court decisions given in any Member State. The abolition means that within the EU no special procedure is required for the recognition and enforcement of decisions, and it is a step that benefits the civil justice system market. The principle of autonomous interpretation is shared in common between the Rome I, the Rome II, and the Brussels I Regulations. An autonomous interpretation means that the Regulations should have their own interpretation, independent of national law. While being independent of national law, however, they are interdependent, in the sense that terms interpreted for one Regulation should be interpreted in a similar manner for the others.

However, while party autonomy, mutual trust, and autonomous interpretation are principles applicable to the recast Regulation, the principles of *forum non conveniens* and *lis pendens* are excluded, as they are not accepted as being of benefit to the civil justice market. The CJEU has maintained a clear stance against *forum non conveniens*, while *lis pendens* has been explicitly regulated by Article 29 *et seq.* of the Regulation. Both *forum non conveniens* and *lis pendens* increase legal uncertainty and threaten the civil justice system market and party autonomy. Party autonomy is the core principle of the Brussels I (recast) Regulation, and it allows individuals and companies to choose the court most appropriate for their situation. Freedom of choice gives parties the possibility of allocating their resources more effectively and of better protecting their rights. Party autonomy and freedom of choice are essential for the competition of civil justice systems, which is based on the ability of parties to choose from among different jurisdictions in the EU. Despite its central position in the Regulation, however, party autonomy is limited in some instances. First, although the Regulation protects weaker parties in employment, insurance, and consumer contracts, choice of court possibilities are limited, and are mostly designed to provide minimal protection. Second, party autonomy is restricted in certain cases relating to the exercise of state sovereignty. Here the state is given a privileged position. If the case is not restricted by these provisions, the parties may choose the court considered the most appropriate (Art. 25). Choice of court is not limited to the nationality or the domicile of the parties, and no connecting factor is required. This means that parties from all over the world can litigate in the courts of a Member State cases that have no connection to the EU. The market for civil justice systems is potentially the biggest beneficiary of party autonomy as regulated by the recast Regulation. Member State courts become available to any party that wishes to litigate in them.

Party autonomy as regulated by Article 25 is one of the jurisdictional rules provided by the Regulation. The other rules were analysed in Section 3.1.4. The jurisdictional rules are organised into general rules and alternatives, into exclusive rules, and into rules on specific matters. The general rule of the Brussels I (recast) Regulation provides that a defendant must be sued in the court of his domicile. For specific cases, the Regulation provides jurisdictions that are alternatives to the domicile of the defendant. The possibility of choosing between a defendant's domicile and an alternative opens the door to a form of competition of civil justice systems known as competition from unilateral choice of court, thus named because the choice of court is made only by the claimant. Cases where both parties make a choice of court create the premises for competition from bilateral choice of court, which is facilitated especially by the provisions of Article 25 of the recast Regulation. Chapter 4 presents a detailed analysis of competition from unilateral and bilateral choice of court.

Exclusive jurisdiction rules and rules on specific matters are an obstacle to the development of the civil justice system market. These rules aim at limiting party autonomy for the benefit of weaker parties or for the state's prerogatives. Without the possibilities of choice, competition is not possible.

The analysis shows that the recast Regulation provides an appropriate foundation for the development of the civil justice system competition, and the most important aspects of this base are party autonomy, mutual trust between Member States, the abolition of *exequatur*, *forum non conveniens*, and *lis pendens*. In particular, party autonomy allows choice of court with few formalities, and in addition allows litigating parties who are neither nationals nor domiciled in the EU to choose the courts of any Member State. Therefore, the pool from which the demand is drawn extends beyond the borders of the EU and becomes global.

While the Brussels I (recast) Regulation provides rules on jurisdiction, Rome I and Rome II provide, respectively, rules on the law applicable in contractual and non-contractual cross-border situations. Section 3.2 presented the most important features of the Rome I and Rome II Regulations, among which party autonomy is the most important. Similar to the Brussels I (recast) Regulation, restrictions to party autonomy are designed to benefit weaker parties. The freedom to choose the applicable law is important in view of the civil justice system competition. Choice of law and choice of court are often decided together, and survey results⁴¹⁹ show that they influence each other. However, the interaction between choice of law and choice of court deserves further research in the form of theoretical and

⁴¹⁹ See Chapter 5 for more.

empirical studies. Additional insights into this interaction will provide valuable information for governments as well as for practitioners.

Diversity of legislation between Member States is one of the ingredients of the competition between jurisdictions. Diversity, however, is burdensome for cross-border trade and commerce. In the EU, traders and consumers face twenty-eight diverse legal situations. Hence, for this and other reasons, the EU has been trying to harmonise legislation in many fields of law. Harmonisation of civil procedure has important connotations for the civil justice system competition. Up-to-date harmonisation has affected only small areas of civil procedure, but has the potential to affect even more significant parts of it.

Section 3.3 provided an overview of harmonisation terminology. Harmonisation projects have been labelled with different names denoting varying degrees of uniformity in the legislation of Member States. In view of this, harmonisation projects range from total unification to mild forms of approximation. Unification implies the existence of the same law in different Member States. With the unification of law, legal differences would cease to be the main sources of competition. Nevertheless, competition would not disappear. Cultural differences in interpreting and enforcing the law would still differentiate Member States from each other, and these small non-legal differences would still allow for a certain competition between Member States. Milder forms of harmonisation would not remove legal differences between Member States, which means that competition would still be present. In this regard, harmonisation should be considered an inhibitor of the civil justice system competition, with its inhibiting power dependent on the intensity of the competition and its ability to unify legislation.

Chapter 4 Civil justice systems competition in the EU

This chapter takes a theoretical approach to the competition involving civil justice systems in the EU. The first step describes the market in the EU. Next, the separate components of the market are analysed. The concept of the civil justice system as a *good*, of litigants and lawyers as creators of demand, and of governments and courts as creators of supply is discussed in other sections of this chapter. The last section provides an analysis of how unilateral and bilateral choice of court influences competition.

4.1 Civil justice systems and competition: creating a market

This section discusses the organisation and certain elements of the market involving civil justice systems. The very existence of this market fosters the conditions necessary for civil justice systems to compete in the EU, and it allows suppliers and customers to find each other and to achieve their business objectives. The attention that is paid by the demand and supply side gravitates towards another important element in the market, which is the actual *good* that is traded: namely, the *good* that is the entire civil justice system itself.⁴²⁰

4.1.1 The civil justice system market

The aim of this section is to describe the civil justice system market and the related elements that facilitate it. Whenever a party is interested in something that involves interaction with another actor, there emerges a market for that ‘something’, which can be a good or a service, and as a rule it has a price.⁴²¹ In the European Union, cross-border litigation has increased over the past few decades, and has been facilitated by an ever-increasing party autonomy. At the same time, some countries in the EU, in particular England, Germany, France, and the Netherlands, have been trying to promote their court systems to attract potential litigators. The price of the court system as a *good* is the fee – or fees –

⁴²⁰ While a civil justice system can be considered a good, its submission to a market and related trading is debated. See for example, Alpa (2004) 45.

⁴²¹ Ledyard, John O. ‘market failure’. The New Palgrave Dictionary of Economics. Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008. The New Palgrave Dictionary of Economics Online. Palgrave Macmillan. 22 December 2017 <http://www.dictionaryofeconomics.com/article?id=pde2008_M000056> doi:10.1057/9780230226203.1029.

that court users are required to pay.⁴²² Court adjudication, cross-border litigants, and the countries trying to attract them create the conditions for the existence of a civil justice system market. In this market, the civil justice system – centred on court adjudication – is the *good* traded, while litigants and governments are the creators of demand and supply. These are discussed in Sections 4.2, 4.3, and 4.4, respectively. Certain characteristics of the market are discussed in this section.

The market as described above is not a place⁴²³ but a system, a process that unfolds in time and space,⁴²⁴ and has its own structure and characteristics. Furthermore, some markets produce externalities that usually require the attention of central governments. Most importantly, markets create premises for the development of competition between the parties involved in it.

4.1.2 Party autonomy and the civil justice system market

Based on the Brussels I (recast) Regulation,⁴²⁵ the supply side of the civil justice system market in the EU is composed of all the EU Member States.⁴²⁶ The Brussels I (recast) Regulation provides the rules for the choice of court and the recognition and enforcement of decisions in the EU, and thus facilitates the competition involving civil justice.⁴²⁷ The demand side is composed of litigants involved in cross-border litigation. The Brussels I (recast) Regulation applies regardless of the nationality of the parties,⁴²⁸ which extends the pool of the demand side beyond the population of the EU. In most conflicts arising outside contractual obligations, claimants have the advantage of choosing the court that will decide on the dispute. In other instances, especially involving cases that derive from contracts, both parties decide to agree on a court for resolving future disputes. The choice of court is made possible by the existence of party autonomy,

⁴²² Some jurisdictions do not charge court fees: e.g. France.

⁴²³ In this regard, Zoppini considers that even though states have boundaries, the market exceeds these. Zoppini (2004) 10.

⁴²⁴ Rothenberg, Winifred B. ‘marketplaces. The New Palgrave Dictionary of Economics. Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008. The New Palgrave Dictionary of Economics Online. Palgrave Macmillan. 22 December 2017. <http://www.dictionaryofeconomics.com/article?id=pde2008_M000064> doi:10.1057/9780230226203.1033

⁴²⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

⁴²⁶ It can be argued that the market as such was created by countries like England, Germany, and the Netherlands, which first showed signs of willingness to attract litigants. However, from the legal perspective, the market also includes other Member States.

⁴²⁷ See for details Chapter 3.

⁴²⁸ And in some cases also regardless of the domicile, e.g. Article 25 of the Regulation.

which creates the conditions for the existence of a demand for civil justice systems and, as a consequence, the existence of the market itself.

In Europe, the advance of the concept of party autonomy has been the result of philosophical and social developments.⁴²⁹ With the development of trade and commerce in the 18th and 19th century, and with the turn of the tide in European politics,⁴³⁰ the individual was considered to be fully independent and free to decide his own future. This autonomy in deciding one's proper future in terms of education, political thought, and social setting also inspired legal emancipation. Many countries recognised the right of individuals to choose the law or court that would better serve their interests. This does not mean total freedom of choice, however, but one limited by safeguards against abuse. Governments imposed and still impose certain restrictions on autonomy.

Broadly speaking, party autonomy was developed in two directions. On the one hand, individuals were given more discretion in drafting and choosing contractual provisions, while on the other hand parties were granted more autonomy to choose the law or court that applies to their legal situation. Contractual freedom allowed parties to escape strict contractual forms that were required by law, which increased the array of contracts that businesses could implement, with the potential of increasing efficiency and reducing costs. Increases in efficiency and reductions in cost can be achieved by allowing parties to better allocate their resources and costs in time and space. Party autonomy creates a positive psychological and social climate for individuals as well as businesses.

Party autonomy allows parties to escape the tutelage of governments in business and non-business situations, and can be exercised either by physically moving to the jurisdiction of choice (vesting domicile in that country), by interacting with a good for which an exclusive jurisdiction is prescribed, or by making a choice of law or court from a distance.⁴³¹ Choice of law allows parties to choose the law applicable to their contractual relationship, while choice of court allows parties to submit their present or future disputes to a court of their choice. These choices are made separately, and it is not mandatory to match the chosen law with the chosen court jurisdiction. Choice of law is exercised by businesses frequently and with

⁴²⁹ Kramer and Themeli (2017) 29-33.

⁴³⁰ During this period, social and political changes transformed Europe's political landscape, from absolutism to a more liberal outlook.

⁴³¹ In the Brussels I (recast) Regulation, the general rule of Article 4 is that persons domiciled in a Member State shall be sued in the courts of that Member State. This means that by selecting domicile in a Member State, a person also chooses the court where he will be sued as a defendant. Furthermore, Article 24 provides for exclusive jurisdictions from which parties cannot depart. Other articles allow parties to choose a court.

ease, but for non-business parties it is not so. In non-business cases, individuals may migrate to find the law of a country that offers better legal solutions. Employees try to find the place that best combines a broad array of elements, including legal protection of their rights.⁴³² Choice of law in family law is also practiced by those who wish to engage in same-sex marriage, or who seek to avoid legislation restricting divorce, artificial insemination, and so on. Many people choose the law and the legal setting of a jurisdiction to regulate parts of their non-commercial life. This is the case for instance in same-sex marriage, parentage (adoption), health care, and libel cases, which create a situation in which one person uses the law best suited to his wishes, by traveling to the country with the appropriate regulations. Given that these cases are in conflict with the public policy of their home countries, choice of law or court may be restricted or not recognised. It can be said that legal tourism exists and is growing. In commercial cases, party autonomy is used extensively to take advantage of the legal regulations in different jurisdictions. Most notably, choice of law is used in company law, tax law, environmental law, and so forth. Companies combine it with other elements to create their business strategies, moving their seats and assets to jurisdictions that offer a good combination of legal protection and economic possibilities. A good choice of seat offers an important competitive advantage to many companies, and a good location can save considerable resources. Consultancy firms regularly suggest to their clients 'lists' of jurisdictions that offer legal benefits. However, the legal migration of workers or of companies from one country to another can be tactically complicated and have far-reaching objectives.

Choice of law enables the application of a certain law or group of laws from a distance, sometimes even regardless of the location of the person. In contract law, parties frequently incorporate a choice of law or choice of court clause in their contracts, without even being present within the jurisdiction they choose. By choosing a certain law, parties can give effect to certain contractual provisions or render them inapplicable, while the jurisdiction of the court can impact the outcome of the entire dispute resolution. Therefore, party autonomy and the choice of law and forum can have a tremendous impact on the outcome of contractual relations.

⁴³² The working force that moves from one place to another is said to be 'voting with its feet' the policies of the hosting country. However, migration is not always undertaken after one has made a reasoned evaluation of the legal situation. Most often migrating workers have strong economic incentives for moving between countries. Bellavista (2006) 5.

The effects of party autonomy can also affect third parties, extending beyond the reach of those directly involved.⁴³³ Affected third parties can incur externalities in the form of costs or benefits, or sometimes both. When benefits exceed costs, third parties find themselves in a positive position. In contrast, if costs exceed benefits, third parties are forced to bear others' costs. The negative effects of a legal situation are sometimes channelled to third parties. Those who benefit from party autonomy, while dumping all the negative effects on third parties, have no incentive to change their behaviour, which raises concerns and can increase conflicts in society. One solution to this is government intervention aimed at reducing party autonomy and preventing negative behaviour. Another solution is to make parties internalise their negative effects, which would also result in a more efficient use of resources and party autonomy. Nevertheless, this autonomy should not be restricted at the first hint of externalities being dumped on third parties; the situation needs to be considered carefully. While considering their actions, however, governments juggle parameters and efficiency indexes, and the task does not appear to be easy.

Furthermore, party autonomy is often distorted by the bargaining power of one of the parties – this being the ability and potential to influence a negotiation process. It derives from different sources, most notably from a party's economic power and its market position. The bigger the party's economic power or the stronger its market position, the more bargaining power he has, which can greatly enhance his possibility of asserting his interest in making a choice of court. The party with the greatest bargaining power will impose his will in a negotiation process, and thus will neutralise the ability of the other party to express his autonomy. Vulnerable parties receive special protection from the government, which either restricts the scope of party autonomy in favour of weaker parties or creates special rules that protect vulnerable ones. Consumers are usually the weakest parties in terms of bargaining power, and for this reason legislation limiting consumers' autonomy tries to protect them.

Information asymmetry also strongly influences party autonomy. Often, one of the parties possesses better information, which improves his knowledge regarding the choice of law or court. The information might have been obtained by investing in research or information sources, or be due to the party's own abilities. Governments try to protect vulnerable parties from information asymmetries by limiting their autonomy, or by obliging parties to share information prior to choosing a court. As is true of bargaining power, consumers comprise one of the most vulnerable groups. More frequently in the EU, regulations require merchants

⁴³³ For example, third parties that want to intervene in a litigation, can do so only at the court chosen by the parties.

to divulge information to consumers in order to decrease any disparity with respect to information. However, information is a valuable asset to many producers, and divulging it can harm their status among other producers.

4.1.3 The market and forum shopping

As mentioned above, party autonomy and choice of court have been regulated by the Brussels Regime, which safeguards vulnerable parties (e.g. consumers and employees), limits that autonomy for certain types of disputes (e.g. immovable property), and protects parties' autonomy with regard to the remaining situations. This legal regime creates the conditions for the existence of the market for dispute resolutions, which allows litigants to use this market to choose the court best suited to their interests. This process is often referred to as forum shopping.⁴³⁴

The term has gained a negative connotation,⁴³⁵ and is often considered to be a negative externality of party autonomy.⁴³⁶ However, demonising forum shopping is a reflection of the fear of seeing law and legal proceedings (including courts) as a good that can be marketed and purchased. This fear is based on the law being perceived as a sacred object that should not be considered as a good offered in shops.⁴³⁷ This study considers the reality to be somewhat different. First, legal researchers and academics praise and study party autonomy, which creates the conditions for 'wandering around courts' and ultimately choosing one of them. Second, law schools teach the basics of party autonomy and the possibilities of choosing from among different courts. Third, lawyers as products of the above-mentioned schools use party autonomy to defend their clients as best they can, while being accused of forum shopping. Fourth, governments approve regulations and procedures to optimise party autonomy and choice of law practices. Fifth, for a long time, international law has been busy making choice a common practice. All of this demonstrates that forum shopping is not discouraged: on the contrary, it seems to be encouraged.⁴³⁸ In view of this, considering forum shopping to be a negative process seems hypocritical.

⁴³⁴ Sometimes called rule shopping, Charny (1991).

⁴³⁵ Algero (1999) 80.

⁴³⁶ Barendrecht (2012) 52.

⁴³⁷ Alpa (2004) 45. Section 1.2.3 elaborates more on the 'shopping' metaphor.

⁴³⁸ Landes and Posner consider that conflict of law rules prevent forum shopping among jurisdictions, while allowing more freedom in shopping for alternative dispute resolution mechanisms. Landes and Posner (1979) 258. Reflecting on this, it can be said that forum shopping and choice of court are related to the qualities that courts and court adjudication have. Courts serve the interest of the state by resolving cases considered important to social peace. Cases not considered to be very important are allowed to be decided by ADR mechanisms. Therefore, freedom in shopping for ADR is considered to be more extensive. Section 4.2 analyses this topic in detail.

It can be said that forum shopping, like any type of shopping, has both a bright and a dark side. Quite possibly forum shopping gained its negative reputation when being used to avoid certain laws in one jurisdiction, with negative consequences for the government of that jurisdiction, or for vulnerable parties. For example, some companies active in one jurisdiction have their registered seat in another, with the intention of avoiding particular legislative restrictions in the jurisdiction where they are active. While this move can be legal, it makes it difficult for governments to exercise control over these companies, and it can hinder consumers' possibilities of protecting their rights. In the case of large corporations, enormous amounts of taxable capital can evade taxation, causing governments considerable problems. Such forum-shopping practices affect not only small countries but also large and powerful economies. One infamous use of forum shopping involves the choice of court, and has been called 'the Italian Torpedo'. The practice consists of filing a claim with a court renowned for its long proceeding times. This affects the possibilities of the other party having a speedy proceeding, and may give a tactical advantage to the user. One of the most famous 'Italian torpedo' cases to be brought in front of the ECJ is *Erich Gasser GmbH v MISAT*.⁴³⁹ In this case, MISAT first seized an Italian court even though the parties had agreed to file any complaint with the Austrian courts. Given that proceedings in Italian courts require relatively more time to be concluded than in Austrian courts, MISAT considered it advantageous to file the case in Italy. The strict rules on *lis pendens* that facilitated this situation have since been revised. Article 31(2) in conjunction with Article 25, 26, and 29 of the Brussels I (recast) Regulation allows the court agreed upon by the parties to ascertain jurisdiction, while the court first seized has to stay proceedings. This argument suggests that forum shopping has its problems. These can be treated, however, by targeting them and not simply by considering forum shopping to be 'the problem'.

4.1.4 Characteristics of the market

Returning to the civil justice system market, it is necessary to describe its main characteristics, which will help the analysis in the next sections. The **price** in a market is an important indicator for the interaction between demand and supply. In a market where demand and supply are price takers, the price of the good traded is the equilibrium between the price asked by the demand and the price offered by the supply. This requires a sufficiently large number of suppliers, with none having sufficient power to influence the supply. Similarly, demand must be large enough to make sure the role of a single member has no influence on its general output. In a situation where supply is controlled by a small (monopoly) or a larger

⁴³⁹ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* 2003 European Court Reports 2003 I-14693 9 December 2003 (Court of Justice).

(oligopoly) group, the price of the product tends to be higher than in the situation described above. In a situation where demand is controlled by a small group of people (monopsony), the price tends to be lower.⁴⁴⁰

However, the situation involving the civil justice system market is different. First, the system is not a single good – it is composed of several services, which are often offered separately. Second, given that the system is composed of several services, users pay for each of them separately. This means that users who pay a price for the whole civil justice system are rare if non-existent. Third, it makes more sense to speak about the price of individual components than the price of the system in its entirety. Fourth, the prices of the different components are not a direct result of the interaction between demand and supply; prices in many European countries are decided by governments. Fifth, the price of any of these goods does not reflect the real cost of the good. In fact, civil justice systems are often subsidised, while courts are not ‘for profit’ institutions.⁴⁴¹ These arguments hint at a preliminary conclusion: namely, that **governments are not motivated by direct economic profit** in the provision of civil justice systems – other motives must be found and considered. If direct economic profit does not motivate governments to provide civil justice systems, it means that suppliers are not profit maximisers, and therefore they lack the incentives to be more efficient and to maximise their profits. Nonetheless, this is deceptive. Civil justice systems and the court system do strive to be more efficient and innovative.⁴⁴² Efficiency in providing services and reducing costs, and innovation in providing new solutions to existing problems become important in a globalised world. In the following sections, the discussion will return to the source(s) that motivates suppliers to achieve efficiency and innovation.

⁴⁴⁰ Chapter 2 considered the heterodox view on competition to be more suitable for the description of the civil justice systems competition. For heterodox economics, price is not the result of interaction between demand and supply, and the orthodox price mechanism should be discarded. The current section does not aim at tackling this debate, but at analysing some of the factors that influence the price in the civil justice system market.

⁴⁴¹ For a detailed overview of the costs of civil procedure in the EU, see Reimann (2011). The EU e-Justice Portal also contains a report on the costs of proceedings in every Member State. Some of them allow courts to lower fees further to accommodate vulnerable social groups. The national reports and the overall study can be found at <https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do> accessed 22 December 2017.

⁴⁴² For example, the Ministry of Justice of the Netherlands has drafted a court reform that aims at innovating the system: see <<https://www.rijksoverheid.nl/ministeries/ministerie-van-veiligheid-en-justitie/inhoud/innovatie-veiligheid-en-justitie>> accessed 22 December 2017. Also the German Brochure ‘Law – Made in Germany’ focuses on the efficiency of the German system. Both these examples show that governments are interested in making courts and the system more efficient and innovative.

Another characteristic of the civil justice system market is related mainly to the characteristics of the supplier. Governments as **suppliers face no risk of bankruptcy** resulting from their behaviour.⁴⁴³ Even if governments face this risk, it is not a consequence of their exposure in the market; even in the most bankrupt state, at least some form or element of the civil justice system remains. In a normal market situation, unsuccessful firms would go bankrupt and vanish. Suppliers would try to avoid the same fate by improving productivity and adapting to the demand's requirements, because failure to respond to signals from the market would deplete the firms' capital and thus bring about their collapse. It should be said that the lack of a prospect of failure removes incentives for efficient behaviour and innovative creativity. Governments know that they will not go bankrupt even though their civil justice system or their court does not innovate. It can be argued that a civil justice system that is not efficient or that does not keep up with changes in society creates social frictions and general discontent. Such frictions can erupt into social upheavals able to overthrow governments and radically change societies. Innovation and creativity require resources and generate costs that are not justified by the price of the product or the profits derived from it. This means that incentives for innovation in civil justice systems should come from other sources and not from the prospects of market gain. Keeping a civil justice system sufficiently efficient and innovative to avoid social unrest and promote economic development is a considerable incentive for governments. However, this can also be seen as an incentive to make a minimal effort to provide a governmental service, and it does not explain the attempt to provide a system that is better than minimal. Furthermore, it is more a political incentive than an economic one derived from the market.

If the market does not provide incentives for innovation, suppliers can become passive by copying the innovations of other suppliers, or by not innovating at all if profit is missing. However, the civil justice system market is not isolated from outside interferences. It is **closely related to other internal markets and cross-border markets**. Before continuing with the description of these markets, a brief clarification is needed. As previously mentioned, a civil justice system is composed of several goods. Among these, court adjudication seems to be the most

⁴⁴³ During 2015, the government of Greece found itself in the position of having little liquidity. Two solutions were proposed: one was to allow Greece to default on its debts, to exit the Euro currency system, and to restructure and resuscitate its economy. This is an example of how a country can go bankrupt even within the EU. Bankruptcy for Greece was spared by the intervention of what is referred to as Troika (European Central Bank, European Commission, and International Monetary Fund). Despite looming bankruptcy, courts in Greece continued their work. Furthermore, it could be said that the economic crisis in Greece or other European countries was not the result of their activity in the civil justice system market, but of other economic factors.

important, and the one that attracts most attention. Given that internal markets and cross-border markets also have non-government suppliers, it makes more sense to focus on comparing the adjudication services provided in these markets. Internal markets are the internal dispute resolution markets. In these, courts organised by the government compete with private dispute resolution mechanisms organised by private parties. Demand is produced by litigants in strictly national cases, and are unable to submit their claim to external institutions. External markets are the dispute resolution markets between courts, organised by the government and dispute resolution mechanisms organised by international private parties. Demand in this market is created by litigants that have the possibility of submitting their case to institutions outside the state's border. Governments supply the same product in each of these markets and with the same price. Therefore, the signals and the incentives for suppliers are multiple, and not only related to the situation in a single market. At this point, it becomes important to know which of these markets is more important, and which one provides more incentives – if any – for governments to change.

Considering these characteristics, the civil justice system market **does not resemble a perfect competition market**. Perfect competition requires a large number of suppliers and a large number of demanders who have no influence on the market. In this situation, self-interested parties are the price takers. Self-interested means that both parties, while trying to maximise their preferences over their set budgets, do not exercise any influence over the market.⁴⁴⁴ In the civil justice system market, the price of civil justice (the good) is not a result of the supply-demand interaction. The governments – as supply – are not always self-interested, as their mission is not necessarily to maximise preferences. These characteristics suggest that the civil justice system market is not a perfect competitive one. While it is true that perfect competition is an idealised situation, the market for civil justice systems seems to be far from that ideal.

4.1.5 Incentives to compete

Incentives derived from internal and cross-border markets are different from each other, and therefore have a different impact on governments. For a better understanding, it is necessary to give a brief description.

First, the internal dispute resolution market is created by a supply side composed of state-run courts and private dispute resolution mechanisms; the demand side is

⁴⁴⁴ Khan, M. Ali, 'perfect competition'. The New Palgrave Dictionary of Economics. Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008. The New Palgrave Dictionary of Economics Online. Palgrave Macmillan. 22 December 2017 <http://www.dictionaryofeconomics.com/article?id=pde2008_P000056> doi:10.1057/9780230226203.1267.

composed of litigants, usually residents of that jurisdiction; and the good in the market is ‘dispute resolution’. Private dispute resolution mechanisms, including arbitration and various forms of mediation, are also known as alternative dispute resolutions (ADR). ADRs are not always alternative, owing to mandatory rules obliging them to litigate in state courts. Furthermore, disputes can be submitted to ADRs only in the event of an agreement between the parties. As regards the good, courts and ADRs have differences in terms of organisation and procedure, although the results are similar.⁴⁴⁵ Compared to the civil justice system market, the demand side in an internal competition is also composed of individuals and small companies. ADRs are in competition with each other but also with courts. They are usually for-profit organisations that increase their revenues by increasing the volume of cases they handle. They compete to attract as many litigants as possible, while improving and innovating their performance.

It can be argued that courts do not compete to increase their profit, but to make sure that every member of society is able to access fair and fast justice. Fair and fast courts impact the perception of justice in the society, and the satisfaction of voters with the government. Voters can express their opinion on the services offered in courts. Thus, social and political pressure create incentives to improve and innovate court services. For governments, the only source of these incentives is the internal market.

In order to attract and please voters,⁴⁴⁶ governments need to make sure they offer high-quality public services combined with reasonable prices. Such a price must be one that does not exclude litigants who have a low income, and that does not make litigation costs prohibitive, but at the same time covers part of the costs of the process and offers some relief regarding the burden of the court budget. While ADRs, and in particular arbitration, are more profit oriented, it has been argued that they can be as expensive as court litigation if not more so.⁴⁴⁷ Courts are less expensive than ADRs because they are subsidised by governments. However, in many countries, governments are trying to reduce the burden that courts place on the state budget. A way to decrease this burden is by reforming courts by making

⁴⁴⁵ A mediation process is very different from a court process, and an arbitration proceeding is different from both of them. Private dispute resolution providers also compete between each other for a share of the market, and they can be also seen as separate markets: e.g. one for arbitration or one for mediation. See for example O’Hara O’Connor and Rutledge (2014).

⁴⁴⁶ This refers to those persons who have voting rights in one jurisdiction, either as nationals or as domiciled.

⁴⁴⁷ Drahozal (2008). This study was conducted in the US, and it is not clear whether it can be generalised for the EU. However, it can be said that on the same open market at any moment there cannot be two prices for the same kind of article. This can be a reasonable explanation as to why the cost of court adjudication is comparable to other dispute resolution mechanisms (at least in certain cases).

them more efficient, and by encouraging the use of private dispute resolution mechanisms. Budget concerns may create an additional incentive for innovation in the court system, while comparable costs within the private sector create the conditions for discharging part of the burden into ADR alternatives. The trend to lower the burden of courts can also be explained in simple economic terms. It is reasonable to think that firms increase in size when they make a profit, and decrease when they fail to make a profit. The fact that governments try to reduce the workload of courts can be an indication that the profit derived from them does not justify the expenses they entail. However, another explanation can be that governments are interested in reducing courts' dispute resolution market failures by adding other markets.⁴⁴⁸

Second, the cross-border dispute resolution market is composed of governments trying to attract litigants, including international litigants who use the possibility of choosing cross-border dispute resolution. As well as governments, the supply side is also composed of ADRs. The demand side is composed of cross-border litigants that have the possibility of choosing between courts of different jurisdictions and international ADRs. These litigants are mostly businesses mobile enough and with sufficient information to successfully use a cross-border dispute resolution mechanism. The cross-border dispute resolution market is similar to the civil justice system market.⁴⁴⁹ These similarities can be found in the services offered (as the good in the market), in some of the potential litigants (as the demand side), and in the courts (as supplies in the market). The price of services offered by the courts is the same as that offered in other markets. It does not cover the costs and does not create profit for the government. Hence, the activity of courts in the cross-border dispute resolution market is not directed towards profit. Therefore, the market does not provide incentives to increase revenues. Given that direct incentives from profit are missing, either some form

⁴⁴⁸ Adding markets would solve the monopoly problem facing the delivery of justice in many states. Adding alternatives to the court dispute resolution seems to be one of them. However, market failures that are caused by non-competitive behaviour are difficult to correct while still trying to hold onto the market. Another solution in this case would be to search for non-market solutions, common for many public good markets. Ledyard, John O., 'market failure'. *The New Palgrave Dictionary of Economics*. Second Edition. Eds. Steven N. Durlauf and Lawrence E. Blume. Palgrave Macmillan, 2008. *The New Palgrave Dictionary of Economics Online*. Palgrave Macmillan. 22 December 2017 <http://www.dictionaryofeconomics.com/article?id=pde2008_M000056> doi:10.1057/9780230226203.1029.

⁴⁴⁹ The two markets overlap in many of their constitutive elements, while giving the impression that one is part of the other. However, this study does not consider either one to be part of the other.

of indirect incentive needs to exist, or incentives must come from outside these markets.

This section introduces the most important elements of the civil justice system market with a particular focus on the EU perspective. Based on this section, the following conclusions can be made. The market is centred on a good (civil justice systems, which mainly serve for the resolution of conflicts), which is supplied by governments and demanded by cross-border litigants. Party autonomy creates the basis for the existence of the demand side, but is restricted in order to protect vulnerable parties and public interests. Furthermore, the market seems to be far from competitive.⁴⁵⁰ Some incentives for innovation that are expected from a market appear to be absent here, which means that participating governments receive incentives from other sources. Furthermore, the civil justice system market does not seem to be oriented towards direct profit from the sale of the goods. Suppliers are ‘fuelled’ by other interests to participate in this market. Some behaviours can be explained by the nature of the supply and demand as well as by the nature of the good offered in the market. Dispute resolution as a good and its importance for the competition for civil justice systems is discussed in the next section.

4.2 Civil justice systems as a good

As previously mentioned, the civil justice system market creates competition opportunities between governments as to who will be most successful in attracting cross-border litigants. Governments’ (supply) and litigants’ (demand) interest revolves around the good on offer, which is the civil justice system of a state. The system is composed of many goods, among which court adjudication is the most important. This section describes and critically appraises the civil justice system as a good, the nature of this good, and what this implies for the competition. First, it gives a critical overview of the definition of and the relation between goods, public goods, private goods, and merit goods. Second, it gives a description of the nature of goods in the civil justice system market. The last part of this section offers conclusions on how the nature of the goods might influence the market and the competition.

⁴⁵⁰ This is true from the orthodox economics perspective; from the heterodox perspective, the market is suitable for the development of competition.

4.2.1 Goods: definition and types

There is no universal definition of the term ‘goods’. In general, objects and processes that benefit a person are called goods (or services).⁴⁵¹ However, some objects or processes are not beneficial: on the contrary, they are harmful. These negative objects and processes are referred to as ‘bads’. Therefore, labelling an object or process as goods or bads depends on the value it creates. This value cannot be absolute or abstract, because human and social needs change in time and space. It is reasonable to think that goods and bads have a subjective value, which is relative to personal situations or standpoints. For example, a peanut is a good to most people because it tastes good and provides nutrients. But for a person allergic to peanuts it is not a good, it is a bad. However, the same peanut can be a good for the allergic person if he decides to trade it and benefits from the trade. The example of the peanut shows that the same object can be a good and a bad at the same time, as its value is dependent on the modalities that it employed, and on the subsequent subjective benefits. Therefore, an object can be a good and a bad, depending on its usage.

With the development of science and human society, almost every object and process is considered a good. To better understand and study them, goods have been categorised in different ways based on some of their characteristics. From an economic standpoint, some categories are common goods and credence goods. *Common goods* are those that benefit all members of a community.⁴⁵² *Credence goods* are those provided by an expert who also determines buyers’ needs, since buyers cannot assess the quality and quantity of goods they need, and as a consequence the market is characterised by fraud and by high prices.⁴⁵³

4.2.1.1 Good with excludability and rivalry

One of the most common ways to categorise goods is to use their characteristics of excludability and rivalry.⁴⁵⁴ Excludability means that during the production or the consumption of the good, it is economically and practically possible to exclude some users from consuming it. Rivalry means that if a person consumes the good(s), the quality and the quantity of the good(s) available for other consumers diminishes. These characteristics can range from full excludability to non-excludability, and from rivalry to non-rivalry. Their combination can create different categories of goods as well. For example, goods that are excludable and

⁴⁵¹ The terms ‘goods’ and ‘services’ are used interchangeably in this chapter. An orthodox view considers goods only to be tangibles, while intangibles are considered to be services. That difference is not made here. Mankowski (2016) 194.

⁴⁵² Moltchanova (2011) 165.

⁴⁵³ Themeli (2016) 19; Hadfield (2000) 968.

⁴⁵⁴ These definitions are mostly used and created by economists. Legal definitions of *public goods* and *private goods* are difficult to find if they exist at all.

involve rivalry are *private goods*; goods that are non-excludable and involve rivalry are *open-access resources*; goods that are excludable and involve non-rivalry are *congestible resources*; goods that are non-excludable and involve non-rivalry are *public goods*.⁴⁵⁵ For instance, if a show of fireworks is on display, it is difficult if not impossible to stop people from looking at it; hence, the show is non-excludable. And regardless of how many people are watching the show, its availability to others is not diminished (non-rivalry); hence, the show of fireworks is a public good. An example of a private good is a bus ride. A bus has limited space as well as limited access possibilities. On the one hand, the producer of the bus ride can easily limit access to the bus and exclude any person from accessing it, thus making the good excludable. On the other hand, the more people that enter the bus, the lower the quality of the bus ride becomes, and the more difficult it becomes for other people to use – to enter – the bus, thus making the good an object of rivalry. Therefore, a bus ride is a private good. Like public goods, private goods can be produced and supplied by private persons as well as by public institutions. However, given that it is difficult to limit the use of non-excludable goods by consumers, pricing them and collecting revenues is also difficult. Consumers of non-excludable goods will try to avoid payment or will understate their preferences for the good (so that they can pay less), while private producers will be dissuaded from producing these goods, even if there is an enormous demand.

4.2.1.2 Merit goods

Another type of good was described in 1956 by Richard Musgrave in a paper on normative theories of public households.⁴⁵⁶ In this paper, he advanced the concept of *merit goods*⁴⁵⁷ as a solution for the difficulties in describing the various goods provided by the government. Since the conception of the term *merit goods*, several authors have contributed to the development of the notion, but a commonly accepted definition has not been reached.⁴⁵⁸ However, the notion of merit goods can be useful to describe the civil justice system as a good. Therefore, it is important to have a working definition of merit goods as well as a short, non-exhaustive description of its development. As first described by Musgrave, merit goods are considered as goods that individuals do not know that they want, but

⁴⁵⁵ Open-access resources are also called *common pool sources*, and congestible goods are also called *club goods*. For this, see Bodansky (2012) 651; Foldvary (2011) 434; Van Aaken (2010) 153.

For public goods see: Van Aaken (2010) 153; Lemieux (2012) 8; Rubin (2007) 26; Bratspies (2010) 147; Foldvary (2011) 434; Kaul (2009) 550.

⁴⁵⁶ Musgrave (1956).

⁴⁵⁷ Musgrave uses the term *merit wants* (the negative aspect which is labelled *demerit wants*), while for public goods he uses the term *public wants* and sometimes *social wants*.

⁴⁵⁸ Musgrave (2008).

the state produces them because they are important.⁴⁵⁹ Elaborating further, Head defined merit goods as ‘those of which, due to imperfect knowledge, individuals would choose to consume too little’.⁴⁶⁰ In his view, merit goods are needed because they have elements of social goods,⁴⁶¹ because better informed people might be justified in imposing their decision upon others, and because the ideal of consumers’ sovereignty and the reality of consumers’ choice may be different.⁴⁶² The common denominator of these definitions is that the government intervenes in the market to produce or force consumers to use a good that they do not consume enough.⁴⁶³ In this regard, a government’s intervention can be viewed as paternalistic or autocratic, but as Ver Eecke points out, from the perspective of a welfare state, microeconomic efficiency is not a government’s only goal. Therefore, the government needs to intervene in order to restore justice and human dignity.⁴⁶⁴ While outlining all the research done on merit goods, Musgrave concluded that the best way to describe merit goods would be to consider them as values created during a historical process of interaction among individuals, and transmitted thereafter as community values.⁴⁶⁵ Some examples of merit goods would be free education, public holidays, regard for the environment, restriction of drug use and prostitution, taxation, and so forth. There is little to disagree with regarding the importance of these goods. Nevertheless, private parties are unwilling to produce either some of them or enough of them, while consumers are ignorant with regard to their needs for these goods. It is submitted that merit goods are not an addition to the public goods-private goods duo. The term merit goods is another way to describe and categorise goods that can also fall into the public goods-private goods continuum. In other words, a good can be both a private and a merit good at the same time.

⁴⁵⁹ Musgrave (1956) 341.

⁴⁶⁰ Head (1966) 3.

⁴⁶¹ In Musgrave’s terminology, *social wants* and *public wants* are interchangeable and comparable (if not the same as) with *public goods*. Head uses the same terminology.

⁴⁶² Head (1966) 3.

⁴⁶³ These contradict the free market principles, where consumers’ autonomy and freedom is paramount in creating the mechanisms of demand and supply. If demand is steered by the government or ‘manipulated by it’ it would distort the free market. As pointed out by the proponents of *merit goods*, individuals are not always able to make a choice (or a good choice) because of ignorance and irrationality. Ignorance is caused by a lack of basic information or by incomplete information. Irrational choice happens when even though consumers have complete and accurate information, in the eyes of an observer, they make ‘irrational’, ‘inferior’, or ‘contrary to their interest choices’. These problems with consumers’ ability to make choices creates the need for merit goods. Head (1969) 216; Ver Eecke (1998) 134, Musgrave (2008).

⁴⁶⁴ Ver Eecke (1998) 144; Musgrave (2008).

⁴⁶⁵ Musgrave (2008).

4.2.1.3 Labelling goods as public goods

Some non-excludable and non-rivalrous goods (or some that almost have these characteristics) are needed for the normal functioning of a society, but private parties are not interested in providing them, for the reasons mentioned above.⁴⁶⁶ At this point, governments intervene in the market to produce these goods.⁴⁶⁷ Nevertheless, not every good produced by the government is non-excludable and non-rivalrous. Some of the goods have the characteristics of private goods, while others are less easy to categorise and define. If we accept in general that the government's role is to serve public interest, it goes without saying that the goods produced by government institutions should be available to all members of society. Therefore, while the government produces goods ranging from public to private, they should try to make these goods as accessible as possible.

However, two problems arise. The first problem is that governments are not interested in making all goods available to the public: for example, state secrets, military equipment, drugs, and so forth. In addition, some goods produced by the government and intended for the general public are private goods in character. With their excludability and rivalry, they cannot be available to everyone. And as previously mentioned, it is common practice for governments to have secrets.⁴⁶⁸ The second problem is more difficult. While governments know from experience and maybe from theory that certain goods are excludable and rivalrous, they would like these goods to be available for everyone in their jurisdiction. To achieve this, governments try to make these goods non-excludable and non-rivalrous, pushing them towards the public good side. This is done not only by producing them and facilitating their availability but also by politically protecting the access and the quality of these goods. Some goods, despite not being public goods, are considered *public goods for political purposes*. The government is so powerful that it can impose its point of view on any person under its jurisdiction.

It should be remembered that the concept of goods is a subjective one, where the value of something as a good is decided by the subject with whom the good is

⁴⁶⁶ Non-excludability is the characteristic that makes it difficult to price the goods and to collect the revenue. This means that goods ranging from pure public goods to open-access resources can be economically non-attractive to private producers.

⁴⁶⁷ Governments often intervene to mitigate public bads produced by society (economy) without having a market solution. An example of this is environmental pollution. Some other bads are resolved by other social structures and mechanisms such as courts. For example, damages to a person or property are compensated by court orders.

⁴⁶⁸ For this study, this point could lead to a philosophical debate. If we claim to be ruled by a democratic state, where the power lies with the people – or voters as holders of sovereignty – the government would also be open and hold no secrets from its citizens. This is not only a duty towards the people as sovereign but is also necessary to allow the electorate to have an opinion related to state matters.

related, and in this case it is the subjective stance of the government to consider the goods as public. For example, public roads or streets are essentially a private good, as they have excludability and rivalry. However, the government produces,⁴⁶⁹ and tries to maintain (making them non-rivalrous) and make them accessible (non-excludable). These attempts are aimed at making roads and other similar goods as comparable as possible with the definition of public goods. Therefore, and because of the point of view of governments on this issue, these kind of goods are usually called public goods. Thus, in everyday life and informally (settings not strictly academic) they are considered as public goods. It is plausible to consider that the government – with its subjective stance and active attempts – creates a category that can be called *political public goods*. In other words, if the government considers a good to be a ‘public good’, then it is a *political public good*, regardless of its rivalry or excludability. As a consequence, the government will try to make this good as non-excludable and as non-rivalrous as possible.

4.2.2 The civil justice system as a good and goods of the civil justice system

4.2.2.1 *Civil justice system as a good*

The term civil justice system as used in the present chapter and throughout this thesis refers to the system of dispute resolution organised by the state and regulated by rules of civil procedure. It begins even before litigation is initiated, continues with the court process, and concludes with the enforcement of the court decision(s). In other words, the civil justice system is a combination of institutions and procedural laws organised by the state and directed at resolving disputes. Procedural law is created and organised by national law-making institutions, and in many European countries, it is collected in codes of civil procedure; amending or changing procedural laws is usually more difficult than changing or amending other laws. Procedural law plays an important role in a dispute, and can outweigh the importance of substantive law, switching the odds of winning from one side to the other. In view of this, parties need to pay close attention to the choice of procedural law. However, parties use certain non-state procedural rules that greatly influence their ability to litigate. In many industries, participants are obliged to resolve conflicts within certain rules and using certain dispute resolution mechanisms. This greatly distorts party autonomy and the demand side’s output.

⁴⁶⁹ A counter-argument might be that the cost of using roads is paid indirectly by way taxes. Nevertheless, this is not the real price.

As regards institutions, a civil justice system is composed of all the judicial and extra-judicial governmental institutions that are set up to handle civil disputes. Each country has a different set of institutions based on history and tradition, and that are often a source of national pride. One of the most important – if not *the* most important – institution is the court. And although the organisation of courts is different in all EU Member States, their mission and function remain the same: namely, the resolution of disputes. Broadly speaking, courts produce two categories of goods: administrative services and dispute resolution services. The first one includes administrative services such as issuing certificates and managing files. The second one, dispute resolution, remains the most important service provided by courts. When choosing a jurisdiction, many parties consider only the court within that jurisdiction, without examining the other elements attached to it. However, in doing so, parties adopt – also part of – the civil justice system of the court they choose. Therefore, by choosing a court, parties select the whole set of goods attached to or related to it.

4.2.2.2 Services provided by courts

Dispute resolution as a good (service) has long been analysed. In 1979, William Landes and Richard Posner described court adjudication as a service composed of three subservices.⁴⁷⁰ The first and the most important of these is conflict resolution, the process whereby a conflict between parties is adjudicated by a judge based on predefined rules. A second service deriving from dispute resolution is law creation. By adjudicating on cases, courts create precedents and rules of behaviour for other courts and parties involved in similar conflicts. Precedents are a primary source of law for common law countries, while in civil law countries they also play an important role in the development of law. The third subservice is adjudications by courts, which also has an educative value. It can show parties in conflict as well as prospective litigants how to interpret and apply laws and procedures. Moreover, it can help researchers and academics to understand and analyse how laws are applied in practice. In civil cases, court adjudication can serve to clarify and to make court decisions more predictable. For example, if two parties enter into a contract, court decisions on similar cases can show the parties what to expect if they adjudicate in a court, and how to modify their actions accordingly. Predictability increases a litigant's ability to predict costs, to predict the outcome of a trial, and to better elaborate litigation strategies. Although a court's conflict resolution service is only a small part of the civil justice system, it is the most important, and it is here that the focus and the

⁴⁷⁰ Landes and Posner (1979) 236.

interests of the parties converge. However, the question remains: What kind of goods are court services?

To answer this question, it is necessary to discuss the position of court adjudication⁴⁷¹ among other dispute resolution mechanisms. In broad terms, disputes can be resolved in two ways: one is by fighting, while the other is by talking. Resolving conflicts by talking can be done with or without the help of a third party, in which case disputes are resolved by reconciliation or negotiation. Obviously, parties in conflict sit together and try to reach an agreement and to respect it. The result is up to them. Third parties may sometimes be involved with the enforcement of the agreement, but this does not change much for the dispute resolution mechanism. Mechanisms that involve a third party include mediation, arbitration, and court adjudication. In all of them, a third neutral party decides upon the conflict. In mediation, a third party helps the conflicting parties to resolve their disagreement. In arbitration, a third party – agreed upon by the conflicting parties – decides on how to resolve the conflict after hearing both sides. Mediation and arbitration can also be conducted by persons not qualified in law, but whose main purpose is to arrive at a solution to the parties' problem. In court adjudication, a third party decides on the merits of the case after hearing the parties. Hearings are conducted by judges usually qualified in law, and with sufficient knowledge of legislation. Currently, courts are organised by the government, but in the past this was not always true. According to Landes and Posner, the provision of judicial services predates the creation of the state,⁴⁷² which means that courts were organised by communities without state support. D'Amico explains that court adjudication in Greek city states was essentially a private good, because not everyone could use it and not everyone was entitled to it.⁴⁷³ Court adjudication was organised by private parties, and cases were handled by persons that knew the law. At some point, the government understood the importance of court adjudication as a conflict resolution mechanism, and took possession of it.⁴⁷⁴ From that moment, the state considered court adjudication to be a public good, and as such tried to make it accessible to every member of the community.

⁴⁷¹ Court(s) in this regard means all the services that modern-day as well as ancient courts provided.

⁴⁷² Landes and Posner (1979) 235.

⁴⁷³ D'Amico (2010) 641.

⁴⁷⁴ Powell and Stringham (2009) 510. The authors give the example of the Anglo-Saxon kings, who made courts a state affair. D'Amico (2010) gives the example of courts in the Greek city states.

4.2.2.3 *A bundle of goods*

Is court adjudication really a public good? Public goods are associated with production and supply problems that affect the market and the possibility of suppliers competing.⁴⁷⁵ Therefore, it is important to investigate the nature of court adjudication and its various components. Court adjudication helps in administering justice and provides a public service. Generally, countries have different modalities of organising court adjudication. Regardless of the differences, the role of court adjudication and its function is recognised all over the world. Its main function is to resolve disputes, while other functions can be labelled as administrative in that they are not immediately related to the resolving of disputes. These functions include education and the creation and development of law. Given that public goods are associated with production- and market-related problems, governments bundle several public goods together with at least one private good in order to better produce and distribute them.⁴⁷⁶ Currently, the original good provided by courts – dispute resolution – is bundled with other goods provided by modern public courts. While court adjudication originally involved only conflict resolution, modern courts combine it with education and the creation and development of law. Nevertheless, these goods are different from each other.

Conflict resolution in courts resembles more a private good, and it is excludable in two instances: first, agents can be prevented from using courts, and second, some disputes can be prevented from being resolved in courts.⁴⁷⁷ Moreover, courts are affected by rivalry, which is a result of their inability to hear an unlimited

⁴⁷⁵ On the one hand, it is considered that public goods allow free riders, while on the other hand, they coerce forced riders. It is also difficult to charge for public goods, which makes them non-efficient to produce. Public goods are also afflicted by externalities. Lemieux (2012) 9; Kaul (2009) 552; Bratspies (2010) 147.

⁴⁷⁶ Ware (2013) 909-913.

⁴⁷⁷ It has been explained elsewhere that disputes are essentially private goods or at best congestible resources. They are excludable (a conflict is limited to a small number of agents) and involve rivalry (conflicts engaged in by other parties will be to the detriment of the parties involved). However, the government is interested in resolving conflicts and furthering social peace, so it provides and organises courts as conflict resolution mechanisms. Moreover, governments are not interested in all the parties who are involved in a conflict, nor are they interested in all the conflicts in the society. On the one hand, for example, many jurisdictions limit the possibility of referring to the court only to a certain category of people: lawyers, nationals of that jurisdiction, adults, and so on. On the other hand, only certain conflicts can be litigated in court: for example, most courts will not litigate a conflict between two individuals on which colour is best – blue or red. Hence, governments consider only certain conflicts to be of ‘public interest’ and only those conflicts (even though private goods) can be submitted to a court’s dispute resolution service. Themeli (2016) 23-26.

number of disputes at the same time. Many courts face more disputes than they are able to process, which, apart from creating concerns for human rights violations, can also render their dispute resolution function useless for the interested parties. The maxim ‘justice delayed is justice denied’ best summarises this situation. As regards the law creation service provided by courts, and following the definition given by Musgrave, law created by courts can be best described as a merit good,⁴⁷⁸ because this law mirrors to a large extent the common values of the community. Moreover, laws are goods that citizens do not know that they need before they are approved, or do not ‘consume’ enough of them. Apart from being described as merit goods, the description of laws can be stretched to include not only congestible resources but also private goods. The scope and application of laws can be limited to a small group of people making them excludable, but their consumption would not come at the expense of other users.⁴⁷⁹ Nevertheless, the law is considered a public good (a *political* one), and law-making is one of the government’s most important responsibilities. The third good to be included in the court dispute resolution bundle is education. Education is considered a classical example of merit goods, and depending on the way it is described, it can fluctuate between being a congestible resource and a public good.⁴⁸⁰ From this, it seems that the diverse goods comprising court adjudication have different characteristics. It can be argued that court adjudication as a bundled good is more similar to the good that forms the most important part of it: namely, dispute resolution. However, for political reasons, courts have been considered a public good, or rather, as *political public goods*.

4.2.3 Competition and the goods

As discussed above, the civil justice system as a good is composed of many other goods and services. Among them, court adjudication seems to be the centrepiece in the mosaic, and comprises three goods, each of which has different characteristics, ranging from private to merit. Those composing court adjudication are conflict resolution, law-making, and legal education. It is reasonable to think that the majority of litigants would consider dispute resolution to be the most important. An exception would be the case of a litigant who repeatedly uses a jurisdiction’s courts for similar cases: in other words, a repeat player. It can be argued that repeat players are interested not only in the resolution of the conflict but also in the law-making and the educative effect of the court

⁴⁷⁸ Musgrave (2008).

⁴⁷⁹ Abuse of law can be considered an example of where the use of law can be at the expense of other users. However, abuse of the law is an illegal way to use the good, and is not what the law-maker (the court) intended. Very often abuse of the law is considered a crime.

⁴⁸⁰ Head (1966), Musgrave (1956) 341, Musgrave (2008), Fiorito and Kollintzas (2004) 1368, Brennan and Lomasky (1983) 201, Ver Eecke (1998) 135, Head (1969) 216-218.

decision. However, one-shot players have little or no interest in law-making or education. For example, imagine a company with a continuing business in a jurisdiction; it is in the interests of this company to establish precedents in its favour and to educate third parties with regard to certain behaviour. One-shot players do not have future stakes in the jurisdiction where the dispute is submitted, and therefore are interested only in the conflict resolution service. The balance between repeat and one-shot players can determine the development of the civil justice system as a good.

In a scenario where one-shot players are the majority of the demand side, goods other than dispute resolution would be a burden and an expensive by-product.⁴⁸¹ Ambitious jurisdictions would try to attract litigants by having lean and agile courts, and at the same time client-oriented and focused dispute resolution services. Being lean and agile would mean that courts and their producers have to compromise and do away with functions not requested by the demand. As a consequence, the production of law and education would need to be transferred to other state institutions. While courts became more client oriented, their public mission would become vague and more similar to that of arbitration. At this stage, it is natural to imagine that the state would be interested in charging the full costs of the proceeding to the parties.⁴⁸² However, some problems might arise. First, and as previously discussed, it is important to understand the incentives that states have in entering into competition, and the incentives that markets give them to compete. Without sufficient motives, governments would be reluctant to enter the competition game. Second, client-oriented courts with higher prices would pose the risk of pricing out vulnerable social groups. A solution to this would be to apply different rates to vulnerable parties.⁴⁸³ Yet another solution might be the creation of special courts or chambers for the external market and other courts or chambers for the internal market. Nevertheless, having different prices and courts/chambers would increase costs for the production of justice, because the training and rules for the two systems would be different. The tension between court adjudication serving the needs of the market and a court without barriers for vulnerable parties mirrors in broad lines the tension between public goods and private goods. Court adjudication and dispute resolutions in particular are essentially private goods; however, if – for political reasons – governments

⁴⁸¹ It should be said that the demand side is not only influenced by its frequency in litigating in a certain jurisdiction. Other elements are also important in influencing its behaviour. These elements are discussed in Section 4.2.

⁴⁸² An increase in court fees can occur even before this stage.

⁴⁸³ Several jurisdictions in the EU apply reduced fees for vulnerable parties. For more, see Hodges, Vogenauer and Tulibacka (2009) 33-34. See as well ‘Study on the Transparency of Costs of Civil Judicial Proceedings in the EU’ (2007), available at <https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do> accessed 22 December 2017.

continue to consider court adjudication to be a public good, first it will or already does deform the market, and second, the courts will not be under the full influence of the market. Therefore, the prospects for competition do not seem promising.

In a scenario where repeat players composed the majority of the demand side, all the court's services would be interesting for litigants. Law-making and education together with dispute resolution would better suit the strategies of repeat players. Governments would have little to change in the current settings of their court system. However, the source of incentives that governments derive from competition remains problematic. As discussed in Section 4.1.1, these sources can play a pivotal role in shaping the course of the competition between jurisdictions. Going back to the current scenario, repeat players usually choose the same jurisdiction, either because they are obliged to or because they choose to. For example, a Portuguese company, present in many markets, decides to divert to Spain all the litigations in which it is involved. In this case, the Portuguese company explicitly chooses the Spanish jurisdiction. Precedents along with the education of legal professionals becomes very important for the Portuguese company in order to increase its success rate in other similar cases, and to exploit the repeat-player's advantage in terms of knowledge and the mass production of litigations. In the EU, as provided by the Brussels I (recast) Regulation, cases in which a company is forced to make a choice of court are justified by the protection of vulnerable parties and public policy.⁴⁸⁴ For example, companies in consumer cases are often obliged to litigate in the court of the customer's domicile.⁴⁸⁵ For a multinational company, this means that they will be present in multiple jurisdictions at the same time. Their repeat-player advantage is reduced in comparison to the first scenario.⁴⁸⁶ Furthermore, some companies can expect a continuous amount of litigation based on the behaviour of consumers, laws, the jurisdiction's legal culture, product characteristics, and so on. This means that even though companies are not expressly choosing the court, they are still

⁴⁸⁴ This situation covers Article 10-16 on jurisdictions in matters relating to insurance; Article 17-19 on jurisdictions over consumer contracts; Article 20-23 on jurisdictions over individual contracts of employment; and Article 24 on exclusive jurisdictions. In general, choice of court is also limited in the event that parties do not have an agreement regarding the choice of court.

⁴⁸⁵ As previously mentioned, choice of court in consumer cases is very limited. Consumers as a vulnerable party are protected and given the opportunity to litigate in their home jurisdiction. The Brussels I (recast) Regulation and in particular Article 18 give the right to consumers to bring proceedings in the courts of the Member State where the other party is domiciled or in the court where the consumer is domiciled.

⁴⁸⁶ It can also be argued that companies will be present repeatedly in all the jurisdictions, putting them in a repeat-player position in each jurisdiction. However, this is not a situation in which companies can choose. Hence, their repeat-player situation is a forced one, and does not contribute to the civil justice system competition.

interested in the law-making and the court's educational function. Consumers will tend to choose their home jurisdiction, unless they consider the jurisdiction of the other party to be more favourable. The absence of choice greatly hampers the market and, as a consequence, threatens the development of competition.

The balance between repeat players and one-shot players can play a substantial role in shaping the goods offered in the civil justice system market.⁴⁸⁷ If one-shot players comprise the majority of the demand side, they will steer the demand to be interested only in courts' dispute resolution services. Governments interested in competing will try to make courts more 'slender' and market oriented. One option would be to unbundle the services connected to the dispute resolution and free the court from the responsibility of producing them. Nevertheless, law-making and education as merit goods will still be produced by other law-making and education institutions. This can be a win-win situation. By reducing the caseload burden, governments can make courts more efficient at resolving disputes. Orienting government policies towards market-oriented courts would influence a relaxed attitude towards a court's dispute resolution mechanism as a *political public good*. In a situation like this, the mechanism would slowly move to its origin as a private good. For litigants, better courts with a client-oriented setting can better serve their interests. This situation can be problematic for vulnerable parties, who can be priced out of the court services. A solution already in use by some jurisdictions is to allow vulnerable parties to pay a discounted price or to have separate courts. Both these solutions would increase the costs of justice for the government.

If the demand side were dominated by repeat players, the situation would not change that much for the court system as a good. Competition would be hampered by an almost non-existent demand (taking into account the protection of vulnerable parties). Repeat players are interested in all the services that courts provide, which means that governments do not have to unbundle goods from dispute resolution. However, what is described here does not take into account market incentives, which remain unclear. It does not take into account political responses and rhetoric, which do not always follow market logic. Finally, it does not take into account the influence of interest groups that are part of the demand and the supply side. These aspects are discussed in the following sections.

⁴⁸⁷ This should be combined with other factors like the willingness of governments to enter into competition, and sufficient incentives for them to do so.

4.3 Lawyers and companies: the demand side of the civil justice system competition

As mentioned in Section 4.1, the civil justice system market and competition are composed of and influenced by the interaction between supply and demand, and by the characteristics of the good in the market. For civil justice systems, the good is in fact a bundle, which is treated as a single good. Among them, court adjudication is the most important, and is a bundle of three services: conflict resolution, law-making, and education. The fact that the good is a ‘conglomerate’ of goods – and the most important of these is a bundle of other services – makes this market unique. Certain obstacles exist here that obstruct its development and, as a consequence, limit the development of competition and competition-related processes. An important issue, referred to in Section 4.1, involves the origin and source of the incentives that jurisdictions have in competing with each other. A first step in tackling this issue is to take a closer look at the demand for civil justice systems. The demand side consists of parties that search for the jurisdiction and the court system that best suit their needs.⁴⁸⁸ This section is an analysis of the demand side; it first describes the composition of the demand side in the EU, and then it analyses the role and the interaction of various demand groups, and the consequences of this interaction with respect to the competition and the market in general.

4.3.1 Characteristics of the demand

4.3.1.1 Interest and choice

The civil justice system was defined as the system of court adjudication organised by the state and regulated by rules of civil procedure, including actions or omissions even before a conflict arises, but relevant when a conflict starts, continuing with the court process and concluding with the enforcement of the court decision(s). Potential customers of civil justice systems in the EU can be any person or company that makes a choice of court following the requirements of the Brussels I (recast) Regulation. The demand side is a part of the set of potential customers, and has special qualities and characteristics. One of these qualities is interest in the civil justice system, which should possess at least two cumulative characteristics: first, there needs to be an interest in past, present, or future disputes; second, it needs to be directed at choosing the civil justice system of a jurisdiction in order to address the dispute.

⁴⁸⁸ O’Hara O’Connor and Rutledge (2014) 89; Coyle (2011) 1933, 1934.

Individuals and companies with related interests in the civil justice system can be jointly called litigants. However, the term ‘litigants’ can be misleading for two reasons: first, the demand is composed not only of litigants but also of parties that have passed their litigation phase and are searching for a jurisdiction in which to enforce their claim; second, part of the demand side is also composed of individuals and companies that are not involved in litigations, but anticipate being involved in them in the future: for example, parties in a contract that includes a choice of court clause. Despite the misleading nature of the term litigants, it describes very well the nature of the demand side, which is always related to litigations, whether in the past or in the future.

Given that the interest of litigants in a jurisdiction is expressed through a choice of court, it goes without saying that choice is detrimental to the output of the demand side and to the development of competition.⁴⁸⁹ The quality of choice can vary between being affected and being genuine. A genuine choice exists when the process of decision-making and the expression of choice is free of psychological and practical obstacles. As regards practical obstacles, the possibilities for litigants to choose should be allowed and clearly defined by law. In the EU, the Brussels I (recast) Regulation sets the basis for the choice of court. As previously mentioned, the possibilities regarding choice of court are not unlimited, as there are certain restrictions aimed at protecting vulnerable parties and the public interest. Moreover, in the EU context, litigants should have sufficient knowledge of twenty-eight different legal systems. This can be an insurmountable obstacle, even for the most experienced comparatist. For laypersons, individual lawyers, and small law firms, acquiring knowledge of all the Member States’ legal systems is virtually impossible. Potentially, large law firms have the means and the resources to undertake a comparative analysis of all the legal systems and to select courts accordingly. However, due to the costs involved, even large law firms can be expected to avoid having to investigate every jurisdiction. Furthermore, with so many potential choices, a choice overload can be expected. Choice overload relates also to the second obstacle in choice making: namely, psychological obstacles. Apart from the problems of choice overload, litigants may be subject to forced choice, a situation in which a person potentially has many options but in practice can choose only one. Reasons for this vary: for example, if two contracting parties with different levels of bargaining power are negotiating, the stronger party will force his will on the weaker.

Choice is considered to be affected when psychological and practical obstacles influence choice making. On the one hand, an affected choice can completely obscure litigants’ real wishes; on the other hand, an unaffected choice is a genuine

⁴⁸⁹ Refer to Section 2.5 for a brief introduction to choice and to psychological implications.

choice. Choice greatly influences the output of the demand side, and this output is made up of the signals that suppliers seek in order to adjust their policies or to create new ones. Adjusting or creating new policies to attract litigants creates competition. A genuine choice made by the demand side gives clear signals to suppliers about their products. And if the suppliers' response is not affected, the resulting competition will most likely bring about the positive effects associated with competition. However, an extreme genuine choice in the civil justice system market seems unlikely. A litigant's choice is affected almost every step of the way. As a consequence, suppliers tend to respond to choices that do not seem intuitive, which raises questions as to the outcome of competition. Will it produce the positive effects associated with it? Or will competition produce negative effects? Or will these effects be a combination of both negative and positive? An answer here is difficult, because it is highly dependent on the affected choice. Empirical studies are needed to target this issue, and longitudinal studies on the effects of competition may answer the question on the effects of competition.

4.3.1.2 Litigants' mobility

Mobility is another characteristic of the demand side's existence. It is essential that litigants be mobile so that they can visit the jurisdiction they have chosen and use its legal system. A mobile demand side should be psychologically and – in the practical sense – physically free. Psychological and physical obstacles are sometimes so integrated with each other that it becomes difficult to recognise them. Psychological obstacles to mobility are those related to choice of court which, as described above, can limit the ability to choose and the desire to move to other jurisdictions.

From a practical point of view, obstacles to mobility can come from legislative or non-legislative sources. In the EU, the principles of free movement of goods and services and the abolition of border control have further facilitated mobility. The Brussels Regime has also made it possible for litigants to be mobile and to choose easily between the courts of different Member States.⁴⁹⁰

Litigant mobility creates costs associated with knowledge and time, as a mobile party needs to know beforehand the attributes of the jurisdiction it is moving to; therefore, knowledge is necessary. It can be expected that individuals, and small and medium-size firms, have limited knowledge of all the jurisdictions in the EU.

⁴⁹⁰ The Brussels I (recast) Regulation allows parties to agree in favour of the courts in any Member State (Article 25). Exceptions to this rule are set to protect special contractual relations, in particular for insurance (Art. 15), consumer (Art. 19), and individual employment contracts (Art. 23). These rules aim at protecting weaker parties. Rules on 'Exclusive jurisdiction' also restrict choice of court possibilities and parties' mobility (Art. 24), for the purpose of protecting the broader public interest. For more see Section 3.1.

For large firms that employ in-house lawyers, it can be easier to learn how foreign courts function. For all of parties, knowledge can be gained from experience or study, and both of these involve prohibitive costs. In the EU, for instance, this would mean having to study a considerable number of jurisdictions. Litigants would be in the position of either educating themselves about jurisdictions with which they were unfamiliar, or restricting their choice possibilities to jurisdictions with which they were familiar. Due to the costs and difficulties relating to this type of education, it can be assumed that the second alternative would be used.⁴⁹¹ In line with the choice paralysis predictions, persons facing a high number of possibilities would restrict their options, or would be paralysed and not make a choice at all. For mobility, this means that despite the high number of potential choices, for psychological and cost reasons, choice makers would restrict their choice possibilities. However, the larger the monetary resources a person had, the more possibilities he would consider.

To increase their mobility, potential litigants can employ a lawyer, as lawyers are educated and trained in local law, and can also be familiar with several jurisdictions.⁴⁹² Providing training relating to other jurisdictions can be easier for lawyers, although is still expensive.⁴⁹³ Moreover, the choice-making process is the same for lawyers as for laypersons, with the choice paradoxes influencing their ability to make a choice.⁴⁹⁴ Nevertheless, lawyers can create networks with colleagues in different countries, and take advantage of the network's collective knowledge.⁴⁹⁵ Furthermore, giant law firms have offices in several countries, and can rely on the expertise of their local lawyers. This means that litigants are able to increase their mobility by increasing the number of lawyers employed.⁴⁹⁶ In other words, wealthy individuals and companies that can afford lawyers' expenses can raise their mobility potential.

Mobility also creates costs related to travel, accommodation, and language, and these costs are relative to the litigants' location. Generally, the farther away from

⁴⁹¹ Low considers that in-house lawyers should encourage firms to think more about applicable law. Low (2013) 384. This can be extended to the choice of court. Imposing a restriction on choice possibilities can restrict potential benefits resulting from litigation strategies.

⁴⁹² Low (2013) 376.

⁴⁹³ Even though the training can be easier and less expensive for lawyers, they might find it more interesting not to do the research, but to rely on their networks, and on their ability to keep clients litigating in the same jurisdiction. Romano (1985) 275.

⁴⁹⁴ Low (2013) 363.

⁴⁹⁵ On the network effect of lawyers and their effects on choice of law and court, see Sanga (2014) 917.

⁴⁹⁶ This can be done either by hiring several lawyers or by hiring a law firm. Law firms invest as much lawyers' time and as many human resources as their client can afford and is willing to pay for.

the chosen court, the more expensive the travel. Although travel-related costs create a barrier to mobility, they are, however, less important to wealthy litigants, who can afford expensive travel. It now becomes clear that the profile of mobile litigants resembles that of a wealthy litigant. Moreover, while court hearings can be fast, they require at some point a physical presence, which means that a foreign litigant is obliged to find and spend some time in temporary accommodation in the jurisdiction where the court is located. Accommodation expenses add to the total costs of mobility, and define more clearly the profile of a mobile litigant as being a wealthy person.

Another barrier to mobility is language, as litigants are generally reluctant to dispute a case in an unfamiliar language. It is well known that the translations required when litigation is in a foreign jurisdiction are very costly. Litigation is often a matter of details and interpretation of words and sentences, which means that litigating about a contract in a language different from that of the contract can be counterproductive for both parties.⁴⁹⁷ Hence, language can be an obstacle to the mobility of litigants, which is to the detriment of competition. It is also possible that litigants employ lawyers with sufficient knowledge of the court's language, but this entails costs that not every litigant can afford. To curb this situation, some jurisdictions have considered using English as the official language in court proceedings.⁴⁹⁸ However, this is a matter of nationalism, and is

⁴⁹⁷ In 2010, some German courts held proceedings in English. These were accompanied by language problems that are evidenced here: <<http://transblawg.eu/2010/05/12/first-german-court-hearing-in-englisherste-verhandlung-auf-englisch-lg-bonn/>> accessed 22 December 2017.

If the language of the contract and the evidence related to it are the same as the official language of the court, the litigating parties will incur fewer translation costs compared to a case in which the language of the contract and the language of the court are different.

⁴⁹⁸ Kern (2012) gives an overview of the situation in continental Europe. Of all the jurisdictions, Germany seems to be predisposed to move forward to using English as a working language in courts.

From 1 January 2016 until 1 June 2017, the Rotterdam District Court – Private Law Division had the option of using English as the working language for cases in the areas of maritime and transport law, or the international sale of goods conducted exclusively between professional parties. Both litigating parties needed to agree on the use of English during the court proceedings. Dutch could be still used by the court during certain procedural steps. The final decision was delivered in Dutch. This was an experiment aimed at accommodating requests of commercial parties, and at testing the potential of English as a working language for the courts. For more, see the rules published by the court service of the Netherlands: <<https://www.rechtspraak.nl/SiteCollectionDocuments/Procedure-Rules-for-proceedings-in-English.pdf>> accessed 22 December 2017.

The Netherlands Commercial Court is expected to open its doors in 2018. The court judges international commercial cases using English during the proceedings. The government claims the benefits it will generate will be between 60 and 75 million Euro per year once the court reaches its maturity. For more, see (in Dutch): <<https://www.rechtspraak.nl>>

a strongly debated topic. Using English in courts implies an extra burden on the courts' budgets,⁴⁹⁹ as judges need to be trained in using English, and laws and procedures need to be updated and translated into English.⁵⁰⁰ Some laws or even constitutions need to be changed to make it possible for English to be the language of courts. Due to the associated costs, language is an obstacle to the mobility of less wealthy litigants.

Given that mobility is dependent on costs, litigants are expected to compare costs to the benefits derived from these costs. If a litigant is confident he will win in a distant and unfamiliar jurisdiction that uses a different language, he will be happy to invest in language skills, in travel and accommodation costs, and maybe in the services of a local lawyer. This sounds easier than it is, however, although it should be part of the litigant's strategy to win a dispute.⁵⁰¹

4.3.1.3 Inactive demand

Broadly speaking, competition entails an interaction between demand and supply. One party offers a product and the other makes use of it. Parties should be sensitive to each other's responses. Interactions create premises for the development of competition between, on the one hand, producers to attract consumers and, on the other hand, between consumers to acquire the offered product. Competition within the demand and the supply side creates the conditions for the evolution of marketed goods, and is expected to provide more efficient rules.⁵⁰² There are cases, however, in which one side of the market is active while the other is inert, and does not respond to the market's stimuli. In the civil justice system competition, the supply side can be inactive and unresponsive to the demand side's interests or requests. In this situation, litigants and lawyers tend to lobby and to increase pressure on their governments to be more responsive. The problem here lies in the power that different groups have in influencing governments, and the outcome of this influence. The more political power a lobbying group possesses, the more chances it has to model the civil justice system according to its needs. Lawyers as a well-organised group are better at lobbying, and have more possibilities of influencing the government to model the

nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Plan-voor-speciale-voorziening-handelsconflicten-definitief.aspx> accessed 22 December 2017.

⁴⁹⁹ Governments at this point need to have a clear picture of the costs and benefits of competition. If revenues justify the investment, governments will be more than happy to invest in language training for judges.

⁵⁰⁰ Sometimes the pressure to use English as a court language comes from interested groups such as lawyers. Kamar (2006) 1752-1753.

⁵⁰¹ This and similar strategies are discussed in Section 4.5.

⁵⁰² Lander and Posner (1979) 258.

civil justice system.⁵⁰³ Lawyers are more interested in pushing forward civil justice system policies that increase the demand for their services, and policies that restrict the entrance of other lawyers into the market. This means that lawyers are more interested in attracting parties from abroad, thereby making their home jurisdiction more attractive to foreign litigants and restricting other lawyers.⁵⁰⁴

If the demand side of the market is not responsive to the activities of the supply side, competing governments will try to promote their jurisdictions by raising the awareness of potential clients. This can be done in two ways: one is by increasing the number of potential customers that they can reach, while the other is by making courts more efficient. Increasing the number of potential customers also means attracting cross-border litigants and lawyers. Making courts efficient will decrease the costs of courts for the governments, and will offer fast courts and procedures to litigants. An easy way to find litigants is to find their lawyers, so governments that try to attract litigants will first try to attract lawyers. This means that the attention of competing governments might be delegated to attracting lawyers. However, many factors still need to be reckoned with, and they raise questions such as: What incentives do governments have to compete? What are the political implications to competition? What will result from the interaction between the local and the international demand side?

Section 4.3.1 provided an overview of the demand's characteristics. The demand side of the civil justice system competition is composed of individuals and companies with past, present, or future stakes in litigation. From among several jurisdictions, litigants choose one or more that they consider would most benefit their litigation prospects. The choice, however, can be hampered by practical and psychological obstacles, which can completely restrict choice possibilities, and as a result damage competition. Litigants need to be mobile enough to travel to the jurisdiction(s) of their choice, but mobility is affected by legal and physical (practical) barriers. Legal barriers in the EU are few, and are mostly related to the protection of vulnerable parties or to particular legal situations. Physical (practical) barriers to mobility in the EU include lack of knowledge regarding the characteristics of the courts in all Member States, lack of knowledge of the

⁵⁰³ O'Hara O'Connor and Rutledge (2014) 87, 89-90; Coyle (2012) 1930-1931, some examples at 1932, 1960; Ogus (1999) 412-416.

⁵⁰⁴ Lawyers are interested in increasing their profits. They can do this either by increasing their current client base or by increasing their clients' need for a lawyer's services. The first option means attracting cross-border litigants and encouraging them to litigate in the lawyer's home jurisdiction. The second option is by making procedures and laws more complicated and more difficult to understand for non-lawyers. Nevertheless, lawyers are not a homogeneous group, and their interests range between the two options. See Heinz, Nelson, Laumann and Michelson (1998). The struggle of these two 'opposing' groups of lawyers plays an important role in shaping the demand side and, in a broader sense, a country's civil justice system.

language of the courts, and costs related to travel and accommodation. Costs can be acceptable, however, if the litigant is confident about recovering them as a result of the court's decision. Lawyers can help parties to be more mobile, because lawyers generally have some knowledge of the courts and professional networks, which can help them overcome language and knowledge barriers. However, lawyers themselves are a source of further costs for litigants. Therefore, it can be expected that wealthy individuals or companies would be the most mobile litigants, and, As a consequence, they will be the target of suppliers. It can be assumed that wealthy individuals and companies are involved in expensive litigations that generate more court fees and other expenses in the jurisdiction they choose. Mobility and choice also relate to the demand side's response. Responding to the offer is essential in the communication between demand and supply. If the demand is interested in the civil justice system competition, but the supply is not responsive, interest groups from the demand side will lobby their governments to yield to the demand side's requests. It can be expected that the strongest lobbying group is composed of lawyers, and governments therefore will have the tendency to approve policies that help local lawyers. If the supply side is more interested in attracting litigants but litigants are not responding, governments will respond by attracting lawyers and litigants from other jurisdictions as well as increasing the efficiency of courts and procedural laws.

4.3.2 Litigants and lawyers

As previously mentioned, litigants would need the help of a lawyer to enhance their legal mobility. However, lawyers are not only used to improve the choice of court experience or to facilitate mobility; on the contrary, they are used mostly to better litigate the case in a particular jurisdiction. Lawyers help litigants to create and execute an appropriate litigation strategy, and part of this strategy involves the choice of court. Therefore, the lawyer-client relationship deserves careful attention.

Lawyers comprise a group of professionals specialised in law, and historically they emerged as a group of learned, wealthy individuals who had sufficient knowledge of the law. In the Early Middle Ages, lawyering was mostly handled by the Christian clergy, but with the spread of education to the economic elite, well-educated individuals began to engage in lawyering. The class of lawyers emerged in this way, and, with the secularisation of the state, they soon replaced the clergy in handling legal cases. Lawyers quickly restricted – and still do – access to their profession and to the possibility of practising law. Obstruction is in the form of legal barriers such as the impossibility for non-lawyers to practise,

the extensive bar regulations,⁵⁰⁵ and the restriction of foreign lawyers to practise.⁵⁰⁶ The possibility of practising law is limited by a knowledge barrier between lawyers and non-lawyers, and by the complexity of laws and regulations that make it difficult to engage in legal proceedings. Furthermore, it is in the interest of lawyers to inflate the demand for their services. However, there is a trend in the EU to keep lawyers out of certain kinds of disputes.⁵⁰⁷

Legal as well as knowledge barriers exist for non-lawyers, which make it impossible for them to litigate in courts. Legal barriers oblige litigants to be represented by lawyers in certain instances. At the same time, the complexity of the law and its procedures makes it impossible for untrained parties to engage in litigation. Another barrier is set by the bar associations and by extensive regulation. Membership in the local bar association gives lawyers the right to exercise their profession within a particular jurisdiction. However, bar association membership and legal provisions tend to restrict foreign lawyers from exercising in a jurisdiction different from their home jurisdiction.

Lawyers have acquired a significant role in negotiating legal relations and in resolving conflicts, and their presence is even more important in cross-border transactions. As previously mentioned, some parties are inclined to use the services of a lawyer – even if not required to by law – in order to have a better overview of the legislation and jurisdictions, and to increase their mobility prospects. However, litigants have different financial capabilities, and not all of them can afford more than one lawyer or qualitatively expensive lawyers. Studies suggest that there is considerable difference between lawyers providing services

⁵⁰⁵ Noailly and Nahuys (2010) 178. Regulation is also geared to keep laypersons away from practising law and from interfering with the lawyer-client relationship. See Cheatham (1965) 439.

⁵⁰⁶ In the EU, the activities of lawyers outside their jurisdictions is regulated by the Lawyers' Services Directive of 1977 (Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977, p. 17–18), the Lawyers' Establishment Directive of 1998 (Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36–43), and the Recognition of professional qualifications Directive 2005 (Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22–142). These directives give the right to lawyers wanting to exercise their profession in a host state to do so following certain rules. These rules mainly regulate the provision of the service and the relation with the local bar association. Despite the regulations, language and differences in legal regulations between countries create barriers that few lawyers can get past. See as well O'Hara O'Connor and Rutledge (2014) 87.

⁵⁰⁷ Hodges (2006) 1399. Examples of this are the European Small Claim Procedure and some forms of alternative dispute resolution. See as well Hodges, Vogenauer and Tulibacka (2009) 5.

for big companies and those providing services for individuals.⁵⁰⁸ These differences result in different sectors within the same profession, and while movement between these sectors can occur, lawyers tend to choose and remain in only one of them. Furthermore, lawyers tend to specialise in one particular field of law, and to remain in that field for a long time or for their entire career.

While discussing characteristics of the demand side, it was concluded that wealthy firms and individuals better fit the demand profile in the civil justice system market. These wealthy persons also employ lawyers who are different from those in the other less wealthy groups. The lawyers' market tends to increase more quickly for wealthy clients, while entry into the 'wealthy' sector seems to be more difficult.⁵⁰⁹ For the civil justice system competition, it means that lawyers can be grouped into those serving wealthy clients and those serving less wealthy clients. The first group is more inclined to encourage and engage in the civil justice system market and competition, while the second group does not have these characteristics, or at least has them to a lesser extent. Usually, lawyers who handle wealthy clients come from large law firms, where they deal mostly with companies, and with individuals that are usually related to the client companies.⁵¹⁰ In summary, lawyers are divided into categories that reflect the wealth of their client, and these categories are almost insulated from each other. Lawyers of wealthy clients are mostly organised in law firms, and are a distinct category that is most likely to play an active role in civil justice system litigation.

4.3.3 The relationship between litigants and lawyers

It is clear that the demand side is composed not only of litigants but also of lawyers. Litigants usually lack relevant information about law in general and foreign jurisdictions in particular, and thus they employ lawyers to assist them. Examining the relationship between litigants and their lawyers might lead to a better understanding of the demand side and its output.⁵¹¹

Lawyers offer legal services in the lawyers market, and this service is almost always used during litigation cases.⁵¹² The same can be said as well about contract negotiations.⁵¹³ However, lawyers are always the agents of litigating or contracting parties, a situation that is considered to create principal-agent problems.⁵¹⁴ The interests of lawyers with regard to the case and the civil justice

⁵⁰⁸ Heinz, Laumann, Nelson and Michelson (1998) 751.

⁵⁰⁹ Heinz, Laumann, Nelson and Michelson (1998) 772.

⁵¹⁰ Heinz, Laumann, Nelson and Michelson (1998) 773.

⁵¹¹ Ogus (1999) 409.

⁵¹² Iossa and Jullien (2012) 678.

⁵¹³ Cuniberti (2014) 455.

⁵¹⁴ Vogenauer (2013) 24; Cuniberti (2014) 455; Romano (1985) 273.

system can be different compared to the interests of their clients. For example, lawyers would be more interested in litigating a case that their clients would be happy to settle. Or in general, lawyers would be interested in maximising the duration of the litigations so that their clients would be obliged to hire them for longer periods,⁵¹⁵ while clients would be more interested in having short litigations. The intervention of lawyers can undermine the intentions and the wishes of clients, and because the output of the demand side would be distorted, the civil justice system competition would be affected as well.

Some studies claim that lawyers tend to dominate the attorney-client relationship, and even the court,⁵¹⁶ a situation that affects wealthy as well as non-wealthy litigants.⁵¹⁷ In many instances, the costs of a lawyer⁵¹⁸ are much higher than those of the courts,⁵¹⁹ which for clients is a very important financial characteristic. Furthermore, court systems have evolved, and are designed to rely on the presence and expertise of lawyers.⁵²⁰ Parties in a conflict often find themselves in a dilemma. Assuming that both parties have the same knowledge of the law, they will be 'equally' equipped before the court, and will reduce their litigation costs if both of them do not hire a lawyer. However, not knowing each other's strategy,

⁵¹⁵ This is, however, arguable. In normal market situations, it might be expected that competition lawyers would lower the litigation time in order to be more attractive to clients. Nevertheless, given the structure of the market, a collusion of lawyers to maintain or increase litigation time should not be excluded. Lawyers' litigation culture also plays a role in their behaviour, given that in some cultures it is expected that lawyers will intentionally delay the litigation. The impression during this study is that lawyers are not interested in reducing the litigation time.

⁵¹⁶ Christie (1977) 4; Nolan-Haley (1998) 1380; Cummings and Eagly (2001) 457; Mather (2003).

⁵¹⁷ For example, Hodges argues that consumer cases in the US are controlled by lawyers rather than by clients. There is an explanation related to costs and their recovery, but the fact is well visible. Hodges (2006) 1395.

⁵¹⁸ It is debatable as to whether lawyers' services can be standardised. In the past, the opinion of researchers leaned on the idea that lawyers provide a personalised service, but it is now accepted that some services can be standardised, while others cannot. Standardised and non-standardised services have different production techniques and charging methods. Many law firms try to standardise their services to attract more clients and to lower the cost per unit of service produced. As regards the civil justice system competition, it can be added that the standardisation (especially of contractual terms) plays a negative role in the competition. If lawyers try to standardise the production of contracts and have standard terms for the choice of court, this will be to the detriment of the civil justice system competition. Some forms of standardisation can be seen in certain industries (e.g. shipping, diamond), where predefined dispute resolution methods and venues become complicated to change. Needless to say, the outlook for the civil justice system competition does not seem promising for these industries. For more on the standardisation of lawyers' services, see Engel (1977) 830; Hazard, Pearce and Stempel (1983) 1088-1101; Sanga (2014) 904.

⁵¹⁹ Reimann (2012) 204, 212; Hodges, Vogenauer and Tulibacka (2009) 14, 18.

⁵²⁰ Christie (1977) 12; Reimann (2012) 226.

and lacking confidence with regard to laws and procedures, parties hire a lawyer.⁵²¹ The lawyer serves as a guarantee in case the other party hires a lawyer, increases the potential to analyse laws and procedures, and offers a form of comfort and assurance to litigants that the litigation is in good hands. By hiring a lawyer, both parties make a financial investment with a view to increasing their winning potential.

The demand for lawyers increases with the increase of wealth in society,⁵²² especially as society has become more litigation oriented. And the more that litigation becomes fashionable, the more that lawyers as a group create a culture of litigation.⁵²³ In line with their power and interests, lawyers become a lobbying group in order to defend their status, and they trigger legal reforms in their own interests. The lawyers market is financially important for economies, and therefore it is protected by the state as being a contributor to the economy.⁵²⁴ For litigants, lawyers' services are also a form of assurance before and during the litigation process. Litigants feel more protected, and partially because of this, they tend to spend relatively large amounts of money for lawyers, in the hope of buying the best possible service they can afford. Research suggests that good service from lawyers provides two gains for litigants: first, by improving accuracy it improves the final decision of the judge, and second, it compels incompetent judges to deliver decisions that are biased towards them. Judges affected by decision bias tend to adjudicate in favour of the most well-known or demonstrably better lawyer.⁵²⁵

The desire of litigants to hire a high-quality lawyer is hampered by their inability to assess their personal needs and by their not knowing where to find an appropriate lawyer.⁵²⁶ Clients being unable to determine their own needs means that lawyers are given the opportunity to assess these needs, and to have a chance to exaggerate them. This situation is reflected in the fees paid to lawyers, which are considered by many clients to be far too high.⁵²⁷ Moreover, with the increasing

⁵²¹ Without considering that in many jurisdiction lawyers are required in high-value cases or cases before higher level courts.

⁵²² Cheatham (1965) 440.

⁵²³ Hodges mentions how the alteration of revenues for lawyers can alter the litigation culture of a jurisdiction; see Hodges (2006) 1397.

⁵²⁴ Miller (2013) 74-76. See also Section 5.2 for certain financial details of the legal market in Denmark, France, the UK, Germany, Luxembourg, and the Netherlands. The lawyers market is included in the legal market, and it can be argued that it makes up a considerable part.

⁵²⁵ Iossa and Jullien (2012) 678.

⁵²⁶ Cheatham (1965) 438.

⁵²⁷ Iossa and Jullien (2012) 679. This opinion regarding lawyers' fees and attitudes is the source of many jokes about them. See Litovkina (2016) for an academic study (not immediately related to this study) on jokes about lawyers.

globalisation of trade and a steadily growing urbanisation, it becomes impossible for clients to know whether a lawyer is capable.⁵²⁸ Despite often feeling more protected with regard to their cases, clients frequently feel uncertain about the lawyer they have chosen.

This situation means that lawyers are able to control their clients by dominating the strategies and their clients' approach towards resolution of the dispute. In addition, the less wealthy the client, the more control the lawyer has.⁵²⁹ Lawyers create a bond with their clients, which once established is difficult to break, and this bond allows lawyers to high-jack their clients' conflicts and to manoeuvre them according to their own wishes. Data from the survey conducted for the present study showed that lawyers consider themselves to be holding the reins in their relationship with clients.⁵³⁰ Responding lawyers were asked if they discuss choice of court with their clients, and the responses showed that 62.1% of them do so about 50% or more of the cases, while 46% of them discuss choice of court in 70% or more of the cases. It is understandable that lawyers and clients would discuss issues related to the case, including choice of court. However, the question did not lead to details about the intensity or the quality of these discussions, which can be assumed to exhaust every query that the clients have. The next step would be the choice of court itself. Asked how often choice of court was made by the client and not by the lawyers, 63% responded that the client made this choice in 30% or less of the cases. This low percentage indicated that lawyers consider choice of court to be mostly their own prerogative. In addition, even in instances where clients choose the court, their choice might be the result of a lawyer's suggestion. Eighty-four percent (86.4%) of the respondents considered that clients followed their suggestions on choice of court in 70% or more of the cases. This suggests that even when clients choose the court, they might be following their lawyer's advice. If this is true, it means that choice of court depends largely on the strategies created by lawyers. Therefore, it can be said that lawyers are the demand side's driving force.

4.3.4 Why lawyers dominate clients

The demand side of the civil justice system market is composed of individuals and companies with stakes in past, present, and future litigations. These litigants

⁵²⁸ Certain websites offer possibilities of reviewing lawyers, but it can be argued that reviews can be easily manipulated and be statistically incorrect with regard to the actual quality of a lawyer. One example of a more reliable evaluation of lawyers is the Lawyer Litigation Tracker, a project started in 2017 by The Lawyer, and that aims at reviewing the performance of court lawyers in the UK and Singapore. For more, see <<https://www.thelawyer.com/lawyer-litigation-tracker-explained>> accessed 6 March 2017.

⁵²⁹ Cummings and Eagly (2001) 458.

⁵³⁰ For charts and analysis, see Section 5.3.4. For detailed data, see the Annexes section.

have to be wealthy and mobile enough to travel between different jurisdictions, and they hire lawyers to increase their mobility potential along with their chances of success in a legal dispute. Given that both litigants and lawyers represent the demand side of the market, their combined interests should in fact comprise the total demand side of the market. As previously mentioned, lawyers tend to dominate their clients when it comes to choosing a court, which means that lawyers can impose their strategies as well as their strategic interest on their clients. This section analyses why lawyers dominate their clients, and its implications for the civil justice system market and competition.

As previously indicated, the lawyers market is characterised by a division between lawyers serving wealthy clients and those serving less wealthy clients. This division comes with certain consequences. First, some studies observed that the majority of lawyers focus on commercial cases, and their clients are mostly corporations. Second, the number of working hours a lawyer dedicates to a client increase according to the wealth of the client. Third, the legal profession has become increasingly commercial.⁵³¹ For the civil justice system, this means that the majority of lawyers will be representing wealthy clients, who are also the most likely to create the demand in the civil justice system market. This further identifies the demand side of market. Based on this reasoning, the demand in terms of civil justice systems can be seen as composed of wealthy individuals and companies, served by a special group of lawyers.

However, this does not answer the question as to why lawyers tend to dominate their clients. The answer is to be found in the structure of the market for lawyers and the legal profession itself. First, the legal profession is naturally entropic in reasoning, which means that laws, procedures, and their interpretation becomes more and more complex. Lawyers try to convince others or try to propose new ideas by identifying similarities and differences that had not previously been noticed. Focusing on similarities and differences between cases increases complexity; on the one hand, it obliges lawyers to spend more time on a case, while and on the other hand, makes it difficult for non-lawyers to engage in the

⁵³¹ This was discovered in Chicago by Heinz, Laumann, Nelson and Michelson (1998). The findings compare a study conducted in 1975 with a similar one conducted in 1995. Even though the study took place in Chicago, the conclusion and the findings can be extrapolated to the EU situation. This extrapolation can be argued, taking into consideration that US and UK law firms comprise almost three quarters of the top one hundred law firms in the world. Law firm statistics are discussed in Chapter 5; detailed data can be found in the Annexes section.

legal profession.⁵³² It is obvious that complexity and the time spent on a case increase the costs of the proceedings for litigants.⁵³³

Second, a lawyer's service is a credence good, this being a kind of good produced by an expert who knows more about the quality of the good than the consumer does.⁵³⁴ This means that the expert producer can dictate how much of the service the client will buy; he can also provide one service instead of another, and he can even inflate prices. In the lawyers market, lawyers are the experts in the field of law, and have extensive knowledge of laws and procedures, while clients find themselves overwhelmed by the complexity of the law and by the impossibility of understanding it. The complexity of legal services also makes it difficult for other experts in the field to evaluate the services provided by a lawyer.⁵³⁵ This difficulty, often combined with the impossibility of holding lawyers accountable for the outcomes of their opinions, creates the conditions for uncertainty about the value of the services. Having no reference points, clients face difficulties in choosing a lawyer based solely on the quality of his services.⁵³⁶ Therefore, in the belief that a higher price indicates superior quality, clients choose the lawyer who offers his expertise for the highest affordable price. Factors used as a spider web by lawyers 'to trap' potential clients include mentioning other famous or wealthy clients, mentioning their win/loss ratio, displaying expensive artwork, and adorning walls with academic background records.⁵³⁷

Third, the lawyers market is of a superstar variety, where the difference in quality between producers is small, while the difference in earnings is enormous. Classical examples of this are artists and sportsmen, who have small differences in quality but huge differences in earnings.⁵³⁸ In instances where lawyers can influence the outcome of a legal case, the result will depend on the quality of the lawyer on one side compared to the quality of the lawyer on the other side. In legal disputes, very often the winner takes everything that is at stake. As a consequence, parties are willing to pay a great deal for a very small increment in the quality of their lawyers.⁵³⁹ Hampered by the law's complexity and the

⁵³² Hadfield (2000) 967; Vogenauer (2013) 24.

⁵³³ While the costs of the proceedings increase for clients, the revenue for lawyers increases as well. Therefore, lawyers benefit economically from the complexity of the law. Ogus (1999) 412.

⁵³⁴ Dulleck and Kerschbamer (2006) 5-6.

⁵³⁵ Hadfield (2000) 969.

⁵³⁶ This was also discussed in Section 4.3.3. Refer also to footnote 528. See also Iossa and Jullien (2012) 678.

⁵³⁷ Hadfield (2000) 972.

⁵³⁸ Schulze (2003) 431.

⁵³⁹ This quality is something that clients cannot be sure about. Complexity and the credence good characteristics of the lawyers market make it difficult to assess precisely the qualities

difficulty in assessing a lawyer's quality, a client will choose the most expensive one. Companies and individuals that can afford to pay the most expensive lawyers compete to have their services. It can be predicted that big law firms will serve the largest companies, and that very few big law firms will exist within a certain market. Thus, a stratification of lawyers and clients can be expected, and can also explain the findings of Heinz *et al.* (1998) on the division of lawyers into categories.

Fourth, facing the complexity of the law – a credence good – and owing to the effects of a superstar kind of market, lawyers' clients see their expenses rise very quickly. Furthermore, the client-lawyer relationship develops slowly and requires time and resources from both parties. These resources represent sunk costs, which are costs that once incurred cannot be recovered. Lawyer's costs are difficult to be transferred to a new lawyer-client relationship, and are difficult to be retrieved.⁵⁴⁰ The existence of sunk costs makes it more difficult for clients to switch between lawyers in the event that they are not satisfied, and lawyers can take advantage of this by inflating initial costs, which will increase the exit costs for their clients. Once the cost trap has been effective, the prices and costs for the clients become 'normal', thus locking a client and his lawyer together.⁵⁴¹ Apart from the financial side, the lock is helped as well by the inability of the client to assess the quality of the lawyer and the complexity of the law itself.

Fifth, litigation resembles sunk-cost auctions, which take place when the bidding done during the auction cannot be recovered. In the legal market, litigations resemble auctions, where the disputed amount is the auction prize. In order to win, litigants invest time and money, and a large part of the money invested goes to lawyers. These costs can be partially recovered only if the case is won, otherwise they are sunk costs. During the course of the litigation, parties find themselves in a kind of auction where they are forced to invest in a lawyer in order to win the case. The problem here is that parties are willing to pay as much as they can in order to win the case and to avoid financial loss. This gives lawyers the advantage, as well as the possibility of extracting fees based on the wealth of their clients rather than on the quality of the service offered.⁵⁴²

of the lawyer. Furthermore, comparing the qualities of one's lawyer with that of the adversary's is even more difficult. Nevertheless, experience and practical knowledge can provide some information on the quality of lawyers.

⁵⁴⁰ Hadfield (2000) 977.

⁵⁴¹ Kamar (2006) 1759. This refers to the high costs related to changing lawyers during a reincorporation within the US. Similar high costs are possible for litigants who want to change their lawyer.

⁵⁴² Hadfield (2000) 982; Hodges, Vogenauer and Tulibacka (2009) 6.

Sixth, the structure of the lawyers market has elements of a monopoly market, with the monopoly created by artificial and natural barriers to entering the practice of law. Artificial barriers are created by laws or regulations that restrict entry into the profession or require special training to become a lawyer. Most notably, to become a qualified litigating lawyer, bar association membership is required, and entry into the bar requires a specific education, a period of training, and (often) an entry exam. Bar associations can restrict the number of lawyers to be accepted into the profession in order to extract profit from the limited number of lawyers available in the market. However, the restriction placed on foreign lawyers creates a major disruption in the civil justice system market, increasing the costs for parties and restricting parties' mobility. Natural barriers to entering the lawyers market consist mainly in the accumulation of knowledge and the ability to create and assimilate complex reasoning. Experience for lawyers is an important key to their success. Novice lawyers require more time and effort to analyse and respond to tasks compared to experienced colleagues, and with the further specialisation of lawyers, experience becomes even more important.⁵⁴³ Experienced lawyers can decide when and with whom they want to share their experience. Intelligence and complex thinking pose another barrier to entering the market. Studies show that lawyers' intelligence tends to be above average, and given that demonstrably high intelligence is not widely spread within the global population, this natural barrier creates an obstacle that is insurmountable for many.

Based on the above reasoning, it can be concluded that lawyers have considerable power over their clients, and its source is to be found in the characteristics of the lawyers market. Law and legal procedures have a natural entropy that increases their complexity over time, and complexity works to the benefit of lawyers. The demand for them increases as well as the time they need to resolve legal problems. Increasing the complexity of the law seems to increase the costs of the legal service,⁵⁴⁴ and clients are unable to determine the real value of a legal service given its credence good nature, which enables lawyers to extract high fees. At the same time, clients find themselves confronted by a complex credence good that increases their uncertainty with regard to the service they are purchasing. To avoid regret and possible financial loss, clients pay as much as they can afford, hoping that the lawyer's high price indicates the quality of his service. This drive to pay the highest price quickly escalates lawyers' costs, which are sunk costs, and drags clients into a sunk-cost auction. As a consequence, lawyers costs increase rapidly, and the possibility of changing lawyers becomes very expensive. It can be said

⁵⁴³ Heinz, Laumann, Nelson and Michelson (1998) 772-773.

⁵⁴⁴ Even though complexity increases in time, companies or individuals can get to know a jurisdiction's legal situation, and reduce the costs of complex laws. Sanga (2014) 918-922.

that lawyers have a superior position compared to their clients.⁵⁴⁵ Financially and psychologically, clients are stuck with their lawyer, and are forced to submit to their strategies and approach to the case. For the civil justice system market, this means that lawyers represent the demand side's greatest power; they are not simply agents, but are a force to be reckoned with, and one that pushes forward its own agenda.⁵⁴⁶

4.3.5 Influence of lawyers on the civil justice system competition

Having examined the factors that place lawyers in a dominant position, and taken into account that lawyers might be the decisive players in the demand side's output,⁵⁴⁷ it is a fitting time to consider the role of lawyers in the civil justice system market and competition. This section examines the following questions: What interests do lawyers have in the civil justice system competition? What is their role in the competition? What is the result of their role and interest?

The legal market's characteristics described in Section 4.3.3 give lawyers the possibility of imposing legal strategies and behaviour upon their clients. As a consequence, in the event of diverging interests involving their clients, lawyers can – or would – further their own interests over those of their clients, including interests in the civil justice system market and competition.⁵⁴⁸ Lawyers would be interested in the competition only if they had a share of the market, and their revenue increased as a result.⁵⁴⁹ However, lawyers are not a homogeneous

⁵⁴⁵ It is suggested that lawyers even hamper the existence of the legal market. O'Hara O'Connor and Rutledge (2014) 89.

⁵⁴⁶ Christie (1977) 4.

⁵⁴⁷ This claim is based on the fact that that lawyers dominate their clients, and that clients accept the legal strategies prepared by their lawyers. From this derives the fact that lawyers make the choice of law and choice of court for their clients. However, it can be said that clients make the choice of lawyer, which in turn can have repercussions in the choice of law and the choice of court. Sanga (2014) 925.

⁵⁴⁸ The competition for incorporation in the US provides examples of how lawyers' self-interest, rather than the merits of the state, determines the domicile of the company. Kahan and Kamar (2002) 685.

⁵⁴⁹ It should be remembered that lawyers operate in a superstar type of market, which creates categories based on the wealth of the clients. The more clients a lawyer has, the more experience, human capital, and fame can be acquired, and the higher in the categories a lawyer can be placed. The higher the category of the lawyer, the wealthier the clients, and the more profit can be extracted. It follows from this that lawyers would be interested not only in competition if their profit increased but also if they had a share in the market, and if an increase in number of cases occurred at a faster rate compared to the rate of new lawyers entering the market. Kahan and Kamar (2002) 705.

A case where lawyers have been active in promoting the competition between jurisdictions is the competition for incorporations. Incentives have been not only direct but also indirect. See Charny (1991) 432.

group.⁵⁵⁰ The division of lawyers into categories and groups leads to them having different interests in the competition. And given that wealthy clients are the group most likely to create the demand in the market, lawyers of wealthy clients would be the ones interested in the competition of jurisdictions.

Broadly speaking, in the EU context, competition can increase lawyers' revenue in two ways.⁵⁵¹ The first way would be to increase their customer pool.⁵⁵² This means that while attracting litigants and other persons in need of legal advice, competing governments would increase the pool of customers for local lawyers, who in turn could take advantage of the increasing number of clients in order to increase their own profit.⁵⁵³ The increase in revenue could be significant if the increase in customers were accompanied by a marginal increase in the number of lawyers. Governments and lawyers' lobbying groups (chambers of advocates *in primis*) would favour increasing the jurisdictional reach of their courts, while at the same time keeping foreign lawyers at bay, and keeping the supply of local lawyers under control.

The second way to increase lawyers' revenue would be to increase their market reach. This would require that lawyers qualified in a certain jurisdiction be allowed to practice in other jurisdictions as well. Allowing this would extend the boundaries of the lawyers market and possibly increase lawyers' income. However, such a situation would result in certain difficulties. Usually, a lawyer is trained, experienced, and qualified to practice law in a particular jurisdiction. Therefore, any foreign lawyer would find it hard to compete with local lawyers, who are more familiar with the language, the laws, and that jurisdiction's practice. Moreover, difficulties in penetrating an already existing market would add to the problems regarding language and experience. At the first sign of competition, local lawyers would lobby their politicians to stop the competition of foreign lawyers. Therefore, it can be claimed that lawyers would have no incentive to promote a civil justice competition that would allow an influx of foreign lawyers

⁵⁵⁰ Lawyers' heterogeneity can obstruct their lobbying ability and prevent them from rent seeking. See Van den Bergh (2000) 449.

⁵⁵¹ A third way for lawyers to increase their revenue would be to increase their fees. Raising fees is independent of competition, as lawyers can do this without the help of competition. Moreover, competition from other lawyers trying to enter the market can push the market down. Predicting a change in fees is more difficult, considering that the lawyers market price is not a direct result of the demand and supply interaction, but is influenced by other factors, as analysed in Section 4.3.3.

⁵⁵² Vogenauer (2013) 63.

⁵⁵³ Some law firms incentivise lawyers who bring in work from outside their jurisdictions. Cuniberti (2014) 455.

in their jurisdiction, even though they have a natural shield against foreign lawyers, and even though this might increase the size of their market.

Lawyers also have considerable lobbying power to influence the civil justice system market, apart from the normal market mechanism as part of the demand. Lawyers interested in competition have the characteristics of a powerful interest group, as they are small, single-task oriented, and well organised.⁵⁵⁴ They have also been considered to have significant influence on politicians,⁵⁵⁵ whom they not only lobby but team up with in order to promote their own jurisdiction.⁵⁵⁶ Moreover, lawyers seem to assert considerable pressure on courts to be competitive and to attract foreign litigants.⁵⁵⁷ Their lobbying activity has two objectives: one is to force the government to increase their jurisdiction's competitiveness, while the other is to generate the creation of laws that increase benefits for lawyers as a group.⁵⁵⁸

Therefore, lawyers are interested in a competition process that would bring more customers into their jurisdiction, while avoiding competition from foreign lawyers, and at the same time maintaining control over the local supply. An attractive system would need to be innovative and up to date, and possess the complexities of the legal market. The entropic nature of the legal market requires innovation and new solutions to problems arising in new and old industries. Furthermore, innovation is needed not only to attract foreign clients but also to keep local clients from fleeing. The other aim of lobbying is to create laws that would increase the income of both local and foreign clients.⁵⁵⁹ This means that while laws, procedures, and institutions are innovated, they should not be simplified. Lawyers need a certain level of complexity in order to sell their expertise.

To summarise, lawyers have considerable power over their clients, which allows them to impose their choice of law and of court strategies. Choice of court, which lawyers are able to influence, is what creates the demand for the civil justice system market. Lawyers exercise their influence by lobbying governments and

⁵⁵⁴ Van den Bergh (2000) 449. However, the lobbying power of lawyers varies from one jurisdiction to another. See: Ogus (1999) 413.

⁵⁵⁵ Called by Kamar a 'symbiotic relationship', see Kamar (2006) 1745. Vogenauer (2013) 63; Coyle (2012) 1931.

⁵⁵⁶ Coyle (2012) 1930. See also Section 5.2.2 on the Law Society and British government collaboration.

⁵⁵⁷ Coyle (2012) 1932. O'Hara O'Connor and Rutledge also examine a competition where judges and courts attract cases. O'Hara O'Connor and Rutledge (2014) 100.

⁵⁵⁸ For tort lawyers as an interest group, see Rubin and Bailey (1994) 814. For lawyers' influence in corporate law reform in the US, see Kahan and Kamar (2002) 705.

⁵⁵⁹ O'Hara O'Connor and Rutledge (2014) 89; Calliess and Hoffmann (2009) 115.

courts to be more competitive in the international market. For this competition to be beneficial for lawyers, laws and institutions need to innovate, maintain a certain level of complexity, attract foreign clients, and protect lawyers from outside competition.

4.4 Governments and courts: the supply side of the civil justice system competition

The analysis of the civil justice system competition is not complete without a close look at the supply side. It goes without saying that a market exists only when there is a good that is demanded by one or more persons, and is offered by one or more suppliers.⁵⁶⁰ The position and the behaviour of the supply side shapes and influences the position and the behaviour of the demand side.⁵⁶¹ If there is only one supplier in the market, that market is a monopoly. Monopolies have been associated with reduced productivity, with lack of competition, and with inflating the market price. Some monopolies are the result of a supplier's attempt to eliminate all competition and to become the sole supplier. Other monopolies, however, are the result of factors outside the suppliers' ability to exert influence. Among factors that hinder the possibilities of new suppliers entering the market are the high entry costs or the scarce production resources. The good traded in the market often creates premises for a monopoly. In fact, some goods, like the city's electricity network, the water pipeline, or the gas pipeline, are costly to produce and to maintain, and so the government steps in as sole supplier of these utilities, and thus becomes a monopoly. Even if these networks are privatised, the new owner will still be in a monopoly situation. Electricity, gas, or water networks are considered public goods.⁵⁶² Similarly, courts and a country's civil justice system are also considered public goods.⁵⁶³ The provision of courts and the civil justice system lies in the hands of the government, the sole supplier. This section analyses the role of the government in this capacity in view of the competition of jurisdictions in the EU. Special attention is paid to the characteristics of the supply

⁵⁶⁰ These conditions are not exhaustive, however, and even if all the conditions for competition exist, it does not mean competition will develop. Coyle (2012) 1930.

⁵⁶¹ The same is also true of the demand side.

⁵⁶² Keeping in mind the analysis in Section 4.2 regarding the definition of public goods, users cannot be easily excluded from their use, and their usage does not produce rivalry. This makes these goods *public goods*. However, it should be remembered that providing and maintaining the network is different from supplying electricity, gas, and water. These utilities are essential for everyday life in modern societies, and have attained the status of *political* public goods, together with their distribution network.

⁵⁶³ Section 4.2 provides an analysis of the civil justice system as a good.

side, to its incentives to participate in the civil justice system competition, and to its interaction with the demand side and the good in the market.

4.4.1 Supply side characteristics

It can be said that any particular market has its origin either in the demand side or in the supply side. In the first instance, consumer demand and the prospects of financial gain lure producers to supply the good requested, and thus create a market. In the second instance, suppliers that have already produced, or are capable of producing a good, create a market by enticing consumers to use the good. In the civil justice system market, it is not clear which side originated the market, although the supply side tends to increase the pool of the demand side.⁵⁶⁴

In the EU, from the introduction to the Brussels Convention to the present Brussels I (recast) Regulation, party autonomy has been extended to include non-residents of the EU or parties without an apparent connection to the EU. In accordance with Article 25 of the Brussels I (recast) Regulation, litigating parties can choose the court of any Member State. Compared to the older versions of the Regulation, the wording of the Recast does not require any of the parties to be domiciled in the EU.⁵⁶⁵ The recast Regulation also increases the potential pool of litigants, and therefore the size of the demand side. It would be too bold to claim that the aim of Article 25 is to increase the size of the civil justice system demand in the EU, but the resulting effect on the size of the demand is clear.

Furthermore, some EU Member States have been promoting their jurisdiction as venues for international litigants, in an apparent attempt to increase their visibility beyond the borders of their jurisdictions. In 2007, The Law Society of England and Wales published a brochure titled 'England and Wales: The jurisdictions of choice' with the subtitle 'dispute resolution'.⁵⁶⁶ The brochure was sponsored by three large English-based international law firms and supported by eleven others. A foreword by the Secretary of State for Justice and Lord Chancellor Jack Straw clearly shows the government's support of this initiative. Moreover, in the same brochure, the Secretary of State for Justice calls attention to the perfect suitability of English courts to welcome international litigants. This theme is mentioned throughout the brochure, where the reader is reminded of the long experience of

⁵⁶⁴ Eidenmüller (2011) 714. Lawyers' interest in having a bigger pool of clients was described in Section 4.3.

⁵⁶⁵ The old version required one of the parties to be domiciled in the EU, which afforded some opportunity to extend jurisdiction beyond the EU. Of course, party autonomy as intended by Article 25 of the recast Regulation is limited by mandatory jurisdiction rules applicable to a particular legal situation, as is apparent from paragraph 5 in the Article. Section 3.1 offers a detailed analysis of the Brussels I (recast) Regulation.

⁵⁶⁶ The brochure has disappeared from the Law Society's webpage, but copies can be found online.

English courts in dealing with international cases. The English High Court is promoted as being experienced in hearing evidence in foreign law and deciding according to that foreign law.⁵⁶⁷ At the same time, the brochure presents English civil procedure as being more flexible than other prescriptive civil procedure codes.⁵⁶⁸ Clearly the intention of the authors and the promoters of the brochure is to entice litigants into the jurisdictions of English courts. By creating this brochure, they aim not only to present the English jurisdiction as a ‘wonder’ of litigation but also to attract litigants not familiar with English courts. In continental Europe, Germany and France took the Law Society’s move as a challenge, and – after much insistence from lawyers – Germany, published a brochure in 2008.⁵⁶⁹ Published as part of a promotional campaign called ‘Law – Made in Germany’ – which includes the brochure and a website – it featured the subtitle ‘global, effective, cost-efficient’.⁵⁷⁰ To date, three editions of the brochure have been published, with the third (2014) version being available in English, French, Russian, Chinese, Arabic, and Vietnamese. The brochure was introduced by Germany’s Federal Minister of Justice, and aims at promoting the use of German contract law, company law, and courts, with the courts being described as independent, fast, and cost effective. Moreover, the brochure enumerates the benefits of German procedural law. It certainly does not hide its intention of attracting international litigants. Considering the languages into which it has been translated and the content of the brochure, it can be said that one of its goals – or at least an indirect one – is to increase the pool of customers for German courts.

While Germany and England are trying to increase their pool of customers and to attract new ones, the Netherlands and France are in a more defensive mode. The tone in the Netherlands is that of a producer that is losing clients,⁵⁷¹ and it appears to have gone on the offensive, promoting itself as an attractive option for commercial litigation. It is expected that in 2018 the Netherlands Commercial Court will begin to operate, and was created to litigate international commercial cases in English.⁵⁷² The tone in France is that of a civil law owner that is losing

⁵⁶⁷ Page 12 of the brochure. Eversheds, as one of the sponsors, maintains a copy in its website. See: <<http://www.eversheds.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf>> accessed 22 December 2017.

⁵⁶⁸ Page 8 of the brochure.

⁵⁶⁹ Calliess and Hoffmann (2009) 117; Koetz (2010) 1243.

⁵⁷⁰ Link to the website <<http://www.lawmadeingermany.de>> accessed 6 March 2017. Link to the English version of the brochure <http://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf> accessed 6 March 2017.

⁵⁷¹ Tjittes (2014) 261-262.

⁵⁷² The launch of the court experiences some delays. It is expected that the court will open its doors before the end of 2017. The website of the Netherlands Commercial Court contains updates about the current status <<https://www.rechtspraak.nl/English/NCC>> accessed 22 December 2017.

to the common law. To fight back, the *Fondation pour le droit continental* was created in 2007, with the aim of promoting the use and development of continental law.⁵⁷³ While this seems less ambitious compared to the English and German brochures, the support from all the major French legal institutions seems to have increased its prestige. It can be argued that while the Foundation has a global presence and promotes the civil law system and the continental courts, indirectly it reaches potential customers of continental courts. These English, German, Dutch, and French examples demonstrate a core characteristic of the supply side of the competition in the EU: namely, the perpetual attempts to increase the size of the demand side, either through legal changes or marketing campaigns.⁵⁷⁴

The civil justice system that is promoted through brochures and promotions is a set of goods and services with different characteristics and different providers. Some services that form part of the civil justice system have the characteristics of private goods, or public goods, or merit goods.⁵⁷⁵ The main components of the civil justice system – court adjudication and procedural law – are products of government institutions. Courts produce adjudication, while parliaments approve the law used by courts. Considering that a civil justice system is a complex mechanism, it goes without saying that its production is complex as well. Courts and parliaments are interdependent, and together they form the supply side in the civil justice system market. However, from the point of view of the demand side, the supply side looks unified and compact, with the executive branch of the government as sole provider. In other words, while producers of the civil justice system are several institutions, the sole perceived supplier in the market is the government,⁵⁷⁶ which resembles a monopolist supplier in one particular jurisdiction.

The government's position as a monopolist supplier raises concerns, as monopolies are associated with lack of competition, price fixing, lack of efficiency, barriers to entering the market for other competitors, accountability, and problems relating to knowledge. As a result, monopolist suppliers do not meet the market's demand.⁵⁷⁷ The existence of a monopolist supplier implies a single

⁵⁷³ From the website of the Foundation: 'It [the Foundation] promotes the radiation of the Romano-Germanic law around the world and in particular in cooperation with States and international organizations concerned'. See more at <<http://www.fondation-droitcontinental.org/en/the-foundation/#sthash.TvMqNZtx.dpuf>> accessed 22 December 2017.

⁵⁷⁴ As in other markets, an early entrance into the competition would give a first-move advantage to other jurisdictions. Brochures play this role as well, as they allow competing states to stay ahead of the others. See in this regard Romano (1985) 226.

⁵⁷⁵ See Section 4.1 to read more on this.

⁵⁷⁶ O'Hara O'Connor and Rutledge (2014) 89.

⁵⁷⁷ Ogus (1999) 406-407.

producer and consequently the absence of competition.⁵⁷⁸ However, while the government is the only supplier of civil justice as a whole, there are other suppliers that produce single goods. In fact, dispute resolution – one of the services included in a civil justice system – is produced by many actors in the forms of arbitration and mediation.⁵⁷⁹ These mechanisms are highly competitive.⁵⁸⁰ Procedural rules, another good that is part of the civil justice system, can also be provided by private parties, and can regulate many aspects of the business sectors. For example, football federations all over Europe have rules and dispute resolution mechanisms to regulate interactions between their members. And despite the monetary interests and the social impact of these rules, they exist and proceed without needing the state.

It is also true that courts have fixed fees that do not respond to market signals. However, it should be noted that the civil justice system is considered a public good with merit good characteristics. The government is interested in producing and subsidising it so that it remains affordable for most members of the community. As a result, the fixing of prices is not monopolist court behaviour intended to extract maximum profit, but a political choice to make litigation affordable.⁵⁸¹

The debate with regard to lack of efficiency on the part of public authorities has been going on for a long time. Courts and law-making institutions have been seen as lacking the efficiency that characterises private providers in competitive conditions.⁵⁸² However, as mentioned earlier, courts compete with other dispute resolution providers in attracting litigants, which promotes an efficient use of the

⁵⁷⁸ Trachtman suggests that a monopoly regarding regulatory jurisdiction may provide benefits that outweigh those of competition. These benefits arise from the economies of scale in producing dispute resolution mechanisms and regulations. Moreover, competition in itself does not always produce positive effects. In some markets where acquiring information is difficult, states should make sure they enable customers to obtain and digest the information. Competition diminishes the role of the government as a regulatory authority, and jeopardises its authority as regards protecting public interests. Trachtman (2000) 337, 340-344.

⁵⁷⁹ This is mentioned in Section 4.1. For a more in-depth analysis, see Themeli (2016) 22-25.

⁵⁸⁰ Eidenmüller (2011) 722.

⁵⁸¹ In February 2015, the Law Society expressed its opinion against changes in the court-oriented fees proposed by the government in England. The Law Society considered it wrong to treat courts as profit or commercial centres. Clearly court fees are considered to be outside market rules or influences (as stated by the Law Society) because of their vital social function. See Enhanced Court Fees - The Government Response to Part 2 of the consultation on Reform of Court Fees and Further Proposals for Consultation - The Law Society response - February 2015, available at <<http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/enhanced-court-fees/>> accessed 22 December 2017.

⁵⁸² For Caplan and Stringham, public suppliers have no incentive to be efficient, and even if they want to be they do not know how. Caplan and Stringham (2008) 519.

courts.⁵⁸³ Furthermore, courts serve a political function, which is to maintain social peace and to offer reliable conflict resolutions, as a weak court system can create fractures that lead to violent unrest in a society. These are some of the reasons that governments try to offer efficient services in courts.

Describing the government as a monopolist in the production of civil justice systems, however, is not entirely correct.⁵⁸⁴ Governments have the monopoly in terms of violence in a society, which gives them a considerable advantage over other private providers. The monopoly of violence gives governments the prerogative to check decisions from other dispute resolution providers, especially in cases related to the execution of these decisions, and may lie at the root of the confusion regarding the government as a monopolist in the market.

In the EU, suppliers in the civil justice system market are the governments of Member States. Their main characteristic lies in the continuous attempt to expand the demand side by extending the scope of application of choice of court rules, and the promotion of their jurisdictions on a global scale. Governments seem to have a monopoly in providing the civil justice system in a jurisdiction, which is a good composed of several services. However, other producers offer services that can replace and substitute the single elements of a country's civil justice system. This means that while governments as suppliers structurally resemble a monopoly, their behaviour does not.

4.4.2 Components of the supply side

The civil justice system is a compound good composed of several services with different producers scattered within the same jurisdiction, and these are usually institutions that are more or less independent of the government. Among others, contributors to the supply side are courts, parliaments, councils of the judiciary, and the government's executive branch. The role of these institutions varies from one jurisdiction to another, but governments coordinate them in order to compose a single offer from the supply side.

Courts are among the most recognisable of the supply-side institutions, and in some jurisdictions they are organised by councils of the judiciary. Usually, **Councils of the judiciary** are responsible for the judge's appointment, dismissal, and career. However, Councils do not have powers of dispute resolution, and cannot influence a judge's decision. If dispute resolution can be considered the

⁵⁸³ To counter this argument, it can be said that governments have no incentive to attract litigants, and they are more than happy to see litigants use other forms of dispute resolution. However, they are also afraid that the legitimacy of the legal system as a whole will suffer. Coyle (2012) 1930.

⁵⁸⁴ Ogus (1999) 407.

most important service of the civil justice system, courts are the most important institutions. Nevertheless, courts rely heavily on government subsidies to function, while governments rely on the work of courts to ensure social peace. Furthermore, courts serve governments' competition interests, whereby governments extract profits while courts do not. From an economic standpoint, courts should be opposed to the civil justice system competition as long as a judge receives the same salary while his workload increases.

Parliaments are the law-making institutions in all EU Member States, and they contribute to the competition by approving or repealing laws of civil procedure. The law-making process is highly technical and political, and from a technical perspective, the drafting and the approval of a law takes considerable time and effort, which in a competitive market is essential. A competitive jurisdiction should be quick to approve new procedures so that it can respond to the demands of the market and the moves of other competitors. However, parliaments have a political agenda that is established by the winning party or coalition. The agenda is influenced by many factors, and is often the result of compromises that do not take into account the fact of the civil justice system competition. Parliament members may feel that their electorate does not consider the competition a priority, or even something to be concerned about. Competition brings benefits to the government and to lawyers, but common voters do not have any immediate benefit. The lack of these benefits for voters creates the conditions in which parliament members do not support unpopular competitive reforms. Furthermore, competitive reforms might need to wait for approval after more populist parliamentary actions have been approved.

Governments are also affected by political pressures. Governments are the results of political elections in which the winning party or coalition of parties must by and large adhere to political promises made in the election campaign, during which a political agenda was presented to the electorate. If reforms aimed at improving the competitiveness of the civil justice system are not popular, governments will find it difficult to win the electoral support or to implement these reforms. However, reforms to improve the competitiveness of a jurisdiction and reforms to improve the judicial system are intertwined. While addressing electoral issues, these reforms serve competition purposes as well. Moreover, governments are also under pressure from lobbying groups with stakes in the civil justice system competition. Lawyers as well as businesses can exercise considerable pressure and promote reforms in their own interest.

Actors on the supply side of the competition include courts, parliaments, and governments. All other conditions remaining equal, courts have a natural interest in avoiding competition if it means being confronted with more caseloads.

Parliaments are the institutions that approve laws required in the competition process. On the one hand, parliamentary work follows procedures that requires time and becomes an obstacle to a speedy response to competition. On the other hand, members of parliament try to gratify their voters and supporters. Any common voter has no direct interest in the competition of jurisdictions, which means that he will not pressure his parliamentarians for this, while groups with an interest in the competition are more willing to lobby. As the executive branch, the government has more incentives to enter the competition race. Nevertheless, governments are constrained by political promises and unpopular reforms. If promises are broken or unpopular reforms are executed, any government will have a difficult time being re-elected. Lobbying groups are able to change this situation, however, and push for reforms that are unpopular but that encourage the government and the system to be more competitive. An analysis of these parties' incentives can lead to a better understanding of their actions.

4.4.3 Supply side incentives

Section 4.1 mentioned the existence of suppliers' incentives in the civil justice system competition. The origin of these incentives has a considerable influence on supplier behaviour and its market. In the foreword to the previously mentioned English brochure, Jack Straw, the Secretary of State for Justice, referred to the benefits that England derives from attracting foreign litigants. These benefits affect mainly the legal sector, but also London's position as a financial hub. The Netherlands has the same reasons for entering into the competition process.⁵⁸⁵ Financial benefits are evidently among the reasons that governments decide to compete, and these benefits can be direct or indirect. Direct financial benefits are those that stream from the fees paid by litigants for the court adjudication process. Indirect financial benefits derive from taxes or other expenses paid by litigants. It might be added that indirect benefits also include certain non-financial benefits for some parties.

For a jurisdiction to have direct benefits would mean collecting enough fees to cover the expenses encountered in preparing a court hearing. However, courts are mostly subsidised by the government, and they do not make a profit.⁵⁸⁶ Direct benefits in the sense of profit do not seem likely to be an incentive to participate in the competition. Hence, as well as direct benefits, jurisdictions that enter into the competition should also have indirect benefits. The sum of both should outweigh the total costs of the effort. Despite a government's wishes, doing this

⁵⁸⁵ Tjittes (2014) 261-262. Some financial reasons were also mentioned in footnote 498.

⁵⁸⁶ Ware (2013) 899; Ver Eecke (1998) 135.

calculation is difficult, and can be determined only by having the government enter the competition process.⁵⁸⁷

Indirect benefits are more complicated to measure but perhaps more important.⁵⁸⁸ Going back to the English brochure's foreword, the Secretary of Justice points out that the legal service industry and commerce will benefit from attracting international litigants to English courts.⁵⁸⁹ The benefits of having a competitive commercial court have been calculated at between 60 and 75 million Euro,⁵⁹⁰ with the legal industry and commerce apparently the principal beneficiaries. Other beneficiaries also include certain producers of services, such as courts and the government itself.

Legal business in England is very important. English law firms are among the biggest in the world, and have important international clients. Part of their success is based on their expertise in English law and English courts. This is because England being their home jurisdiction they have a starting advantage compared to non-English law firms, as English law and English Courts are very often chosen in cross-border cases. The Netherlands has an important legal industry as well. Dutch law firms are also interested in attracting commercial litigations, while at the same time exploiting their own knowledge of the Dutch system. It is obvious that these law firms are highly interested in pushing the government to compete and to attract litigants. Furthermore, they are interested in international litigants, because these tend to be large and to spend more.⁵⁹¹ A law firm's profit from representing international litigants is taxable by the government, which makes it an indirect profit. Taxes are another source of indirect profit, and are collected from hospitality services like hotels, restaurants, and bars where international litigants are likely to go. The English and Dutch examples can be extended to any jurisdiction that tries to attract litigants.

Incentives for the supply side to compete are also influenced by other factors. Among the actors are judges, especially those of higher courts, as they find it

⁵⁸⁷ Stringham and Zywicki (2011) 292. Competition should be used as an alternative only if it provides greater benefits than other institutional choices. This means that the competition for jurisdiction should be compared to other institutional alternatives as well, and not only be justified by a costs and benefits analysis. Trachtman (2000) 348.

⁵⁸⁸ Eidenmüller (2011) 713.

⁵⁸⁹ 'Of course, that has a knock-on effect and the success of the legal services sector plays an unquantifiable role in helping London to maintain its position as a major centre for global commerce.' England and Wales the Jurisdictions of Choice (2007) 5.

⁵⁹⁰ For more, see (in Dutch) <<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Nieuws/Paginas/Plan-voor-speciale-voorziening-handelsconflicten-definitief.aspx>> accessed 22 December 2017.

⁵⁹¹ Romano (1985) 248.

flattering to be mentioned in textbooks as well as in decisions of other courts. Being mentioned in textbooks or in decisions also improves their professional reputation and career opportunities. This moral profit serves as an incentive for judges to favour participation in the civil justice system competition. These ambitious judges influence their governments to be more attractive to international litigants, as these litigants have more complicated cases that at the same time are similar to those handled by other courts. Resolving one of these cases would resonate throughout the EU, enhancing the reputation and self-esteem of judges that issued the decision.

A last – though not least important – incentive for governments to compete relates to the general appeal of a jurisdiction to investors. Investors play a significant role in the economic development of many countries, and these economies are geared towards attracting as many investors as possible. This requires, among others things, good institutions and laws, as they form part of the civil justice systems, and are considered carefully by investing companies. Companies consider fast courts and clear procedural laws to be a precious asset to protect their investment. Competition may create the conditions to have efficient and clear rules, and therefore help countries attract investments that in turn increase the welfare of a state by making voters happy with the government in charge, and increasing its chances of being re-elected.

The final calculation of the incentives is not easy. Governments are faced with the most difficult task, which is to calculate the final benefit. This means weighing costs with direct and indirect benefits, but while direct benefits are easy to measure, indirect benefits are more difficult.⁵⁹² Furthermore, certain groups, like lawyers and judges, lobby the supply side to compete with other jurisdictions. Courts and judges are glad to be cited and mentioned in the decisions of foreign or lower courts. This strictly personal benefit is an incentive for certain judges to push the government to attract foreign litigants that in turn bring business to another group: namely, lawyers. Lawyers and law firms increase their profit when the number of litigants increases; thus, financial benefit is the incentive for lawyers to lobby for more competitiveness and for attracting foreign litigants.

4.5 The process of court adjudication competition

The civil justice system competition results from the interaction of the demand and the supply side. The four previous sections of this chapter analysed the good and the market that gives rise to the competition, and the various characteristics

⁵⁹² It can be argued that indirect costs can arise as well. Indirect costs ought to be part of the final calculation of benefits.

and actors that compose the demand and the supply side of the market. Demand is created by litigants wealthy enough to be cross-border mobile, while the output of the demand is dominated by lawyers organised mainly in large law firms. The interest of lawyers and clients can be different and even contradict each other. While clients seek a speedy and successful court process, lawyers seek to increase their profit from a court case. The interest of lawyers can be furthered by having a longer case-processing time and more complex laws, while the interest of clients can be furthered by having a shorter case-processing time and simplified laws. As the supply side, competing governments find themselves in the position of interpreting or understanding the needs, behaviour, and activity of the demand side. This undertaking is complicated by, among others, political and social factors. Political factors include influences from lobbying groups such as lawyers and judges, while social factors include the response of the population to changes in the court system – which is primarily manifested through their vote – but also the influence of reforms aimed at enhancing competition regarding the quality of life of the population. Building on these previous sections, the current section analyses how litigants can be expected to make a choice of court, and what factors are considered to be the most important.

4.5.1 Competition from a unilateral choice of court

The demand side of the civil justice system market is composed of litigants⁵⁹³ or prospective litigants, who either face a situation where the conflict has already arisen, or are prospective litigants facing a potential future litigation. Assuming that they want to resolve the conflict, and that they did not make a choice of forum before the conflict arose, they can either agree to choose a conflict resolution mechanism – which is a remote possibility after the start of the conflict – or one of them – the claimant – files a suit in a court. The situation in which one of the parties decides to ask a court to resolve the conflict creates the conditions for a unilateral choice of court demand, which is characterised by the ability of one party to make a choice of court and to initiate the process, and the relative inability of the other party to take the same steps. In other words, it is a situation in which one party takes the initiative to choose the court where the conflict will be adjudicated, and invests this court with the necessary procedural and financial means.

In a unilateral choice of court situation, the claimant has the advantage of taking the first step and deciding where to file the suit. The result is that two scenarios can arise. In the first, the litigants are obliged to address a specific court for legal

⁵⁹³ The litigant is considered to be the lawyer and the client acting as a single unit.

reasons, or because of the usage or practice in a certain industry.⁵⁹⁴ Competition cannot start at this point, because the demand side is deprived of choice options. In the second, where the parties are not bound by any obligation, the claimant has the possibility of finding the court most suitable for his needs.

In the EU, rules on jurisdiction are regulated by the Brussels I (recast) Regulation, which applies to civil and commercial cases, with exceptions listed in Article 1. Apart from the application of exclusive or weaker party jurisdiction rules, the Regulation's general rule requires claimants to start proceedings in the defendant's court of domicile.⁵⁹⁵ However, Articles 7-9 offer one or more alternatives. Generally, these alternatives relate to events or situations that create a connection with the dispute. It should be noted that while claimants have the advantage of the first move, their choice is not unlimited. Limits are set to prevent the possibility of defendants abusing claimants.

In view of the limited choice allowed by the Regulation, claimants should be careful when choosing a court, and properly calculate their possibilities. The claimant's main interest is in winning the dispute and forcing the other party to comply with the court's decision. Exceptions to this rule exist in cases where the claimant files suit in order to block the other party's actions in other courts, or the claimant is interested in making the other party incur legal costs, or in winning time through court actions. Other possibilities may exist as well. Choice of court, therefore, is a difficult puzzle to unravel. Considering this and aiming at fleshing out basic elements that influence claimant's choice of court, the analysis in this section simplifies the intentions of the claimant. It also assumes that he is interested in winning the case, while trying to maximise or minimise one other element. Three elements are considered and analysed in the following sections: namely, cost, benefit, and utility. Some claimants may try to combine all or some of these elements when making a choice of court. Apart from these, the following assumptions about claimants are made: they have knowledge of all the jurisdictions in the EU; they have knowledge of the laws in these jurisdictions; and they have enough time to invest in the trial.

4.5.1.1 Choice of court for cost-minimising claimants

While benefits come only in the event of a victory, litigation costs are certain in both victory and defeat. Claimants are usually interested in keeping litigation costs low. With this as a starting point, this section examines the elements that a cost-minimising claimant considers when making a choice of court. It is assumed

⁵⁹⁴ This should be considered a forced choice (see also Section 2.5 on Choice of Law). Even though it is possible for one or both of the parties to choose a court, trade usage and industry practice suppress their choices.

⁵⁹⁵ See Section 3.1 for a detailed description of this.

that the claimant is interested only in winning the case and minimising the costs, hence other objectives or tactical moves are not considered. Cost-decreasing or -increasing factors like cost shifting – which is examined in the following sections – are also not considered. Based on these assumptions, a claimant will be facing only his own costs during the course of a litigation. Among the most common costs associated with litigation are court fees, lawyers' fees, translation costs, travel and accommodation costs, and administration costs.⁵⁹⁶

Usually, court fees are proportional to the value of the claim or are fixed for claims that are below a certain threshold. It can be expected that in commercial cases this threshold is exceeded often and easily, meaning that court fees are a function of the claimant's claim and of the court's coefficient to calculate the fee. Therefore, for the same claim, a claimant can expect different costs in different jurisdictions.⁵⁹⁷

Moreover, another source of costs involves lawyers' fees. Two methods can be assumed to be the most used: one is by charging hourly fees, while the second is by charging a fixed amount – a lump sum for the whole service. A combination of both is also possible.⁵⁹⁸ Therefore, lawyers' costs for a claimant would be equal to the hourly charges plus any fixed amount. Assuming that there is no difference between sectors, lawyers' experience, and countries, hourly charges depend primarily on the length of the litigation, meaning that the longer it takes, the more the lawyers' costs will accrue.⁵⁹⁹ Among others, the following factors can influence those costs for the claimant: complexity of the case and legal procedures, number of lawyers hired, instance of the court, degree of lawyer-client familiarity, and the litigation jurisdiction. The degree to and the way in

⁵⁹⁶ For litigation costs in the EU, see Reimann (2011), Hodges, Vogenauer & Tulibacka (2009) and Illmer (2010).

⁵⁹⁷ Let us assume that court fees are C . If the monetary value of the claim is σ , court's fee can be expressed to be $C = f(\sigma)$. The simplest form of the function is $C = c\sigma$, where c is a coefficient used to calculate the court fee. Calculations of court fees, however, can be more complicated than this, and include more coefficients and factors. For simplicity, $c\sigma$ will be used in the following analysis.

On costs of litigation in Europe, see also Dori and Richard (2017).

⁵⁹⁸ Contingency or success-oriented fees are also applicable in some cases in the EU. However, they are the exception to the main rule. See Reimann (2011) 220, Hodges, Vogenauer, Tulibacka (2009) 28.

⁵⁹⁹ For a claimant, lawyer's costs (L) are the sum of hourly charges (hL) plus any possible fixed amount (iL). As mentioned, hourly charges (hL) are a function of the litigation's duration (τ), therefore, $hL = f_L(\tau)$. The relation between τ and hL depends on many factors, however, the longer it takes for a litigation the higher will be the cost of the lawyer. Other factors to be considered when calculating a lawyer's costs are the complexity of the case, the jurisdiction of litigation, and the parties involved in the conflict. Finally, the total cost for the lawyer for a litigant would be $L = hL + iL$ or $L = f_L(\tau) + iL$.

which these factors influence the lawyer's costs can be very different.⁶⁰⁰ Considering that the claimant is trying to litigate in a foreign jurisdiction, two scenarios can exist: either the claimant uses one lawyer in his home jurisdiction and another one in the jurisdiction where the litigation takes place, or he uses a lawyer only in the jurisdiction where the litigation takes place. In the first scenario, lawyers' costs would be equal to the costs of both home and foreign lawyers.⁶⁰¹ It can be assumed that litigating in a foreign jurisdiction increases the complexity of the case, especially if the case is connected loosely with that jurisdiction. The more that complexity increases, the more lawyers charge. Evidently, litigating in the jurisdiction best connected with the case is motivated by the prospect of lower lawyers' costs. To this reasoning, it should be added that a lawyer's familiarity with a foreign jurisdiction decreases the complexity of procedures factor, given that the more familiar a lawyer is with a system, the less complex he should consider that system to be.

Other cost sources are travel, accommodation, and communication. Making a choice of court means that claimants will often have to choose a jurisdiction that is not their home jurisdiction. This choice creates some costs that relate to the distance between the claimant's home jurisdiction and the location of the court.⁶⁰² Travel costs depend primarily on the distance between the location of the claimant and of the court.⁶⁰³ The greater the distance, the higher the costs will generally be. Within the EU, communication costs can also increase with the distance, which means the greater the distance, the higher the costs. Accommodation costs can

⁶⁰⁰ All of these factors can be considered as coefficients that influence the costs of lawyers (L). Among others, the complexity of the case and the legal procedures (κ) also influence other litigation costs: for example, the translation of documents (ι A). As regards the costs of lawyers, the complexity of the case and the procedures influence both the hourly rates and the lump sums that lawyers charge, where the more complex the case or procedures, the more the costs increase. Considering also the case's complexity coefficient, lawyers' costs would be $L = \kappa_h L + \kappa_f L$ or $L = \kappa f_L(\tau) + \kappa f_L$. The same reasoning can be followed as well for the other factors: for example, the instance of the court. High instance courts automatically increase the costs. E.g. $L = \eta_h L + \eta_f L$, where η is the court's instance price-increasing coefficient.

⁶⁰¹ The total cost would be $L = L_1 + L_2$, where L_1 is the cost of the home jurisdiction lawyer and L_2 is the cost of the foreign jurisdiction lawyer. It goes without saying that both L_1 and L_2 can be expressed as $L_1 = hL_1 + fL_1$ or $L_1 = f_{L1}(\tau) + fL_1$ and $L_2 = hL_2 + fL_2$ or $L_2 = f_{L2}(\tau) + fL_2$.

⁶⁰² It can be argued that distance also increases the complexity of the procedure (κ). The greater the distance between two jurisdictions, the more differences in culture, law, and litigation they might have. While the distance in itself does not increase the absolute value of the procedure, it increases the relative complexity for the claimant, which is reflected in higher costs.

⁶⁰³ In some situations, costs might be lower owing to the presence of good connecting hubs that serve many transportation options and maintain low travel costs.

vary per season, country, city, kind of accommodation, and number of persons accommodated. Nevertheless, accommodation costs are also dependant on the duration of the court process. This means that the longer the court hearing continues, the more accommodation costs will accrue. Assuming that the claimant will always – or most of the time – need accommodation in the foreign jurisdiction during the progress of the court process, the longer it takes to resolve the case, the more accommodation costs will increase. As a result, costs related to the distance between the claimant’s location and the location of the chosen court are the sum of travel, accommodation, and communication costs. It goes without saying that these are directly related to the distance between the claimant’s home and the litigation venue, but are also related to the length of the litigation process. If a claimant chooses his home jurisdiction, travel and communication costs will be zero or near zero.⁶⁰⁴

A claimant that chooses a foreign court may incur costs related to the certification and/or the translation of documents. Because these relate to the administration of the litigation, they can also be called administrative costs. Costs for the certification of documents include notarial costs, or costs for the certification of documents by other institutions, and so on. Translation costs are related to the translation of documents into a language recognised by the court. It can be assumed that the more complex the case or procedures, the more documents are needed, and the more translation costs increase. These costs can be kept down if the language of the documents used by the parties is the same as the language of the court, or at least if the claimant uses the same language as the court. In this regard, English as the language mostly used in cross-border contracts and in English-speaking courts creates an advantage in terms of minimising translation costs. Bordering countries that use the same language are also suitable for the purpose of reducing translation costs. For example, German claimants that go to

⁶⁰⁴ Let us assume that costs related to distance are D . This way, travel costs are (tD) , accommodation costs are (aD) , and communication costs are (cD) . Travel costs (tD) are dependent upon the distance between the claimant’s location and the court’s location. This means that if δ is the distance between the two locations $tD = f_{tD}(\delta)$. It goes without saying that the greater the distance, the greater the costs. Distance can also influence communication costs. In this case, cD would also be $cD = f_{cD}(\delta)$. Accommodation costs depend on the length of the court process, meaning that $aD = f_{aD}(\tau)$. The shorter the litigation time, the lower the accommodation costs for the claimant. In total, costs related to the distance between the claimant and the court are $D = tD + aD + cD$, or $D = f_{tD}(\delta) + f_{aD}(\tau) + f_{cD}(\delta)$. If the claimant chooses his home jurisdiction ($\delta = 0$), travel costs (tD) and communication costs (cD) will be zero or near zero.

Austria to litigate can save translation costs because the same language is used in both countries.⁶⁰⁵

This section analyses the strategy of a cost-minimising claimant. It is assumed that the claimant is only interested in winning the case and in minimising his own costs. An example of this kind of claimant would be a small company with limited litigation budget; or a company that does not see so much value in the claim itself, but is concerned with minimising costs. Factors that might increase or decrease costs, like cost shifting, are not considered here. The court's fee, the lawyers' fees, distance-related costs, and administration costs comprise the bulk of the total litigation costs. This means that for the same case, the cost of litigation abroad depends on factors that are different for each jurisdiction. These factors are the court's fee coefficient, the duration of the litigation, the distance between the litigant's location and that of the court, and the complexity of the case and the procedures. A claimant interested in keeping litigation costs low will try to keep these factors as low as possible. While some of the factors are outside the claimant's control, like the complexity of the case, some others, like complexity of the procedures, duration of the litigation, and distance between home and court, are relative to the court chosen. A cost-minimising claimant will be interested in choosing a familiar court with noncomplex procedures and fast proceedings – two factors that are related to each other. In general, the more complex the procedures, the slower their pace. Therefore, choosing a familiar jurisdiction with noncomplex procedures might increase the speed of litigation and reduce costs. In addition, a claimant will be interested in finding a court as near as possible to his location. Proximity to the court will keep distance-related costs low, and at the same time decrease complexity-inflating factors such as social and cultural differences. For example, a claimant from Spain might find courts in Portugal and France better because the distance is relatively short, and the legal, social, linguistic, and cultural differences are likely to be smaller compared to courts in Cyprus or Estonia. In summary, a cost-minimising claimant will try to choose a court that has low court fees, is close to his location, is known to process cases quickly, and uses relatively noncomplex procedures.⁶⁰⁶

⁶⁰⁵ Let us assume that costs related to the administration of a litigation are A . Administrative costs are composed of costs related to the certification of documents (cA), and to the translation of documents costs (tA). The complexity of a case can increase the number of documents needed, and therefore the translation costs. As a consequence, tA would be a function of the case's complexity coefficient, $tA = f_{tA}(\kappa)$. In total, administrative costs would be $A = cA + tA$, or $A = cA + f_{tA}(\kappa)$.

⁶⁰⁶ If claimant's costs for litigation abroad are Γ , then Γ is equal to the court's fee (C), lawyers' fees (L), distance-related costs (D), and administration costs (A). This means that $\Gamma = C + L + D + A$, or $\Gamma = f(\sigma) + (hL + rL) + (iD + aD + cD) + (cA + tA)$, or $\Gamma = c\sigma + [f_L(\tau) + rL] +$

4.5.1.2 *Choice of court for benefit-maximising claimants*

The above analysis considers the choice-related reasoning of a claimant that aims to minimise costs. A cost-minimising claimant will calculate the costs of all the possible jurisdictions, and choose the one that offers the lowest. However, some claimants may decide to choose the court that maximises their benefits. Benefits would come in the event of success in the litigation, so here it is assumed that the claimant is sure to win. The benefit from a litigation would be equal to the monetary and moral benefits derived from winning it, plus the costs that would have been shifted to the other party. Monetary benefits are equal to the claimed amount adjusted by the court's accuracy coefficient, which measures the degree to which the court tends to accept the claim of the claimant. For specific cases, circumstances, and parties involved, courts can have varying degrees of accuracy with regard to accepting a claim.⁶⁰⁷ More in general, a court's accuracy depends on internal and external factors, with the latter including the quality of the lawyer and the accuracy of the claim. Lawyers that are more highly skilled can argue the case better, which helps the court to issue an accurate decision. Internal factors are the extent of the expertise, training, and professionalism on the part of judges. The higher the expertise, and the more highly trained and professional judges are, the more accurate the decisions will be. This means that a benefit-maximising claimant will be interested in courts with experienced and well-trained judges.

Moreover, claimants also attach moral values to a court case, which produce moral benefits. These values may include reputation, feelings, moral obligation, and so forth. It is difficult to monetise the worth of moral benefits, because each person holds a different set of principles and ethics; even companies have different sets of standards and ideals to which they adhere. Consequently, each claimant attributes a different value to moral benefits as well as a different monetary significance. Moral satisfaction depends on the court's accuracy coefficient and the duration of the proceedings. The length is inversely related to moral satisfaction, which means that moral satisfaction decreases over time. The

$[f_{tD}(\delta) + f_{aD}(\tau) + f_{cD}(\delta)] + [cA + f_{tA}(\kappa)]$. Evidently costs Γ are dependent on the court's fee coefficient (c), the length of the litigation (τ), the distance between the litigant's location and the location of the court (δ), and the complexity of the case and the procedures (κ). A cost-minimising claimant will try to control (minimise) c , τ , δ , and part of κ . As a result, the claimant will be naturally inclined to choose a court that offers low court fees, is near his location, promises short litigation times, and offers noncomplex procedures.

⁶⁰⁷ Let us assume that the claimant is sure to win; that σ is the claimant's claim in his suit; π is the accuracy coefficient of which the court accepts the claimant's claim; and $\pi\sigma$ is the amount granted by the court decision. In this case, π is $0 < \pi \leq 1$. If π is equal to one ($\pi=1$), the court accepts the claim entirely; if π is between one and zero, the court partially accepts the claim; and if π is equal to zero, the claim is rejected. In this case, π cannot be zero, because it is assumed that the claimant is successful in his claim.

more time that passes from the start of the litigation, the more the claimant's moral satisfaction decreases.⁶⁰⁸

The third source of benefits is cost shifting, which is the practice of fully or partially transferring costs from the winning party to the losing party. Each jurisdiction has its own rules in this regard.⁶⁰⁹ Generally, some court fees and lawyers' costs are paid by the losing party.⁶¹⁰ To simplify, this analysis considers that each jurisdiction uses a return coefficient to calculate cost shifting. Considering these assumptions and the reasoning, a benefit-maximising claimant will be interested in choosing a jurisdiction that offers the highest cost-shifting coefficient.

The above analysis considers that the total benefit derived from winning a case will be the sum of the monetary benefit, the moral benefit, and the cost-shifting benefit. A possible example of this type of claimant, would be a large company that does not pay so much attention to litigation costs, but is interested only in extracting all the possible benefits from the litigation. Naturally, a benefit-maximising claimant will choose the court that best fulfils this objective. Courts that offer high cost-shifting rates and have high accuracy coefficients will be the most natural choice.⁶¹¹ Court accuracy depends on the quality of the judges and

⁶⁰⁸ As regards moral benefits, let us assume that M represents a claimant's maximal moral satisfaction gains from winning the case, π is the accuracy coefficient to which the court accepts the claim, τ is the length of the litigation. Ideal moral benefits from winning a case would amount to πM . The more time that passes from the start of the litigation until the decision of the court, the more the claimant's moral satisfaction decreases ($\tau \neq 0$ because zero would mean the withdrawal of the claimant from the case, which means no court decision at all and no satisfaction thereof). Assuming that moral satisfaction decreases uniformly over time, we have $\pi M/\tau$. It can also be assumed that the more time it takes for a court to reach a decision, the more moral benefits a claimant gains. However, these should be considered exceptional cases, as in normal situations it is safe to assume that moral satisfaction lessens over time.

⁶⁰⁹ Hodges, Vogenauer, Tulibacka (2009) 19; Reimann (2011) 200.

⁶¹⁰ Cost-shifting rules allow the winning party to recover some costs incurred during litigation. These costs are recovered by shifting them to the losing party. Every jurisdiction uses a different method for calculating shifted costs, which usually is a function of the total costs of the parties. Therefore, if total costs are Γ , shifted costs are $f(\Gamma)$. The simplest form of this function is $\rho\Gamma$, where ρ is the return coefficient of the costs for a particular jurisdiction, and Γ are the costs incurred during litigation. If ρ is equal to one ($\rho=1$) costs are shifted entirely, and the winning party recovers all costs, if ρ is equal to zero ($\rho=0$), no costs are shifted. Therefore ρ is $0 \leq \rho \leq 1$. At the beginning of the analysis it is assumed that the claimant is interested only in maximising the benefit, regardless of the costs. So rather than calculating costs return ($\rho\Gamma$) as a reduction of costs ($\Gamma - \rho\Gamma$), it should be calculated as a benefit in the case of winning, and therefore added to the monetary and moral benefits.

⁶¹¹ The analysis in this sections considers that if benefit is β , its total value can be calculated as $\beta = \pi\sigma + \pi M/\tau + \rho\Gamma$. This calculation considers the coefficient of which the court's decision

the courts. The more highly trained judges and the more experienced courts are more likely to make accurate decisions, and to be preferred by benefit-maximising claimants.

4.5.1.3 *Choice of court for utility-maximising claimants*

However, not all claimants cannot be sure about the outcome of a case as was assumed for the benefit-maximising claimant. This means that while some costs are certain, the benefits of selecting a particular jurisdiction are not. Therefore, when choosing a court, some claimants may try to maximise their utility. In this case, utility means the difference between all the possible benefits and all the possible costs. Possible benefits are all the benefits from litigating in a jurisdiction (as analysed above) adjusted by the success ratio in that jurisdiction. As previously mentioned, possible costs are all those related to litigating in a jurisdiction in addition to the possibility of incurring the shifted costs of the defendant. Thus, utility is composed of two parts: one measures possible benefits, while the other measures possible costs.

The possible benefit of litigating in a particular jurisdiction is the result of all the benefits that can be gained from a jurisdiction adjusted by its success ratio. This ratio is the one between the cases decided in favour of claimants in similar cases, and the total number of similar cases adjudicated in that court. Success ratio can be implied from anecdotal evidence, but a better evaluation can be derived only from transparent and predictable courts. Transparency means the court has clear and easily acquired statistics, while predictability means the court is stable in the decisions it gives, is not afflicted by corruption, and offers clear, exhaustive, and consistent reasoning throughout similar cases. A utility-maximising claimant will be interested in maximising this component, which means that he will be interested in transparent and predictable courts that favour the claimant in that particular type of case, or claimants in general.

accurately accepts the claim (π) to be equal for both the moral and the monetary claim. However, some claimants consider their moral claim to be satisfied if the court also grants them satisfaction in the form of a partial monetary award, or provides no monetary award but a large moral award. The opposite can be true as well. In this case, π_σ would be the coefficient of satisfying the monetary claim of the claimant, while π_M would be the coefficient of satisfaction for the claimant's moral claim. This means that the benefit of the claimant can be expressed also as $\beta = \pi_\sigma\sigma + \pi_MM/\tau + \rho\Gamma$, where $0 \leq \pi_\sigma \leq 1$, $0 \leq \pi_M \leq 1$, $0 < \tau$, and $0 \leq \rho \leq 1$. Because moral benefit is difficult to calculate it is easier for the study to assume that the coefficient for moral and monetary benefit is equal, so the simplified calculation would be $\beta = \pi\sigma + \pi M/\tau + \rho\Gamma$. To conclude, when choosing a court, benefit-maximising claimants will try to choose a court that is accurate, fast, and offers high cost-shifting rates.

The second component of utility involves possible costs. These consist of unavoidable costs, which were analysed above,⁶¹² and possible costs shifted from the winning defendant. Unavoidable costs are always present, and depend on the court fee, the length of the proceeding, the distance between the court and the claimant, and the complexity of the case and procedures. The defendant might incur different costs because he does not pay the court fee, pays a different lawyer, and the distance from the court is different for him. To simplify the analysis, it is assumed that the defendant incurs costs similar to those incurred by the claimant. For the claimant, the possibility of incurring in cost-shifting is equal to his own shifted costs adjusted by the defeat ratio in a particular jurisdiction. The defeat ratio is the inverse of the success ratio. As a result, a utility-maximising claimant will be interested in reducing the possible costs in a jurisdiction. In jurisdictions where the success ratio is low, the claimant will be interested in low cost-shifting rates, while in jurisdictions where the success ratio is high, the claimant will be interested in high cost-shifting coefficients. For the remaining cost components, the same reasoning that was followed in Section 4.5.1.1 can be followed here. This means that a claimant will be interested in low court fees, fast and noncomplex procedures, and a short distance between his location and that of the court.⁶¹³

This section analyses the behaviour of a utility-maximising claimant. Utility is the difference between all possible benefits and all possible costs. Possible benefits depend on the success ratio of the claimant, on the accuracy of the court, and on the length of the litigation. Possible costs depend on the non-success ratio and other cost-related factors like court fees, complexity of the case and the procedures, distance from the court, and length of the proceedings. A utility-

⁶¹² See Section 4.5.1.1.

⁶¹³ The possible costs of litigating in a jurisdiction is equal to the costs of litigation plus the possible costs shifted from the other party, $\Gamma + (1 - \omega)\rho\Gamma^A$, where Γ is the cost of the claimant, Γ^A is the cost of the defendant, and ρ is the return ratio of the costs for a particular jurisdiction. In this case, ω is the success ratio of the claimant, which means that $1 - \omega$ is the defeat ratio of the claimant. Success ratio is the ratio between similar cases won by similar claimants and the total number of similar cases adjudicated by a given court ($\omega = n_p/n_t$), obviously $0 \leq \omega \leq 1$. In general, $\Gamma^A \neq \Gamma$, but to simplify the analysis it can be assumed that $\Gamma^A = \Gamma$. This means that the possible costs of litigating in a jurisdiction would be $\Gamma + (1 - \omega)\rho\Gamma$, or $\Gamma(1\rho - \omega\rho)$. Given that the claimant is interested in maximising the utility, the value of $\Gamma + (1 - \omega)\rho\Gamma$ should be as small as possible. A claimant would be interested in having a small cost-shifting coefficient (ρ) if the possibility of winning (ω) is low, and is interested in having a big cost-shifting coefficient if the possibility of winning (ω) is high. From Section 4.5.1.1, a cost minimising claimant is interested in reducing c , σ , τ , δ , κ . From the analysis in this section, a utility-maximising claimant has the same interest in reducing these elements, and in addition is interested in choosing a court that offers at the same time high ω and high ρ , or if ω is low, ρ should be low.

maximising claimant must be careful to strike a balance between all the elements that influence his utility. It is easy to imagine that most of the claimants try to weigh up the costs and benefits from a litigation, and choose based on this assessment. It is not always the court that offers the highest benefits or the lowest costs that offers the highest utility. Choosing from among all the different factors is extremely challenging.⁶¹⁴

4.5.1.4 Concluding remarks on competition from a unilateral choice of court

Section 4.5.1 analysed what influences the choice of court in a unilateral choice of court situation, where only one of the litigating parties – usually the claimant – chooses. The analysis is important for defendants trying to predict the claimant's choice, for the claimant himself in choosing the best court, and for competing countries so that they can better deploy their resources in the civil justice systems competition. The analysis assumed that the claimant wants to win the case and maximise the benefits or the utility from the win, or minimise the costs of litigating in a given jurisdiction. An implied assumption is that claimants choose a court without considering other elements or institutions involving a civil justice system. If other elements are considered, the results might be different. From the onset, the analysis assumed that the lawyers' and the clients' interests are the same; that claimants have sufficient knowledge of all the jurisdictions; and that claimants have plenty of time to engage in litigation.

From the analysis, it can be concluded that several factors persistently influence a claimant's choice. These factors are the value of the court's fee, the court's

⁶¹⁴ Some claimants decide to base their choice of court on the utility they derive from that court. Obviously, the jurisdiction that offers the most benefits will be chosen. In this analysis, utility means the difference between the possible benefits and the possible costs of litigating in a jurisdiction. This means that $\Phi = \omega\beta - [\Gamma + (1 - \omega)\rho\Gamma^A]$, where Φ is the utility of litigating in a jurisdiction, β are the benefits of litigating in that jurisdiction, Γ are the costs of the litigant, Γ^A are the costs of the defendant, ω is the success ratio of the claimant in that jurisdiction, $1 - \omega$ is the non-success ratio of the claimant or the success ratio of the defendant, and ρ is the cost-shifting coefficient of that jurisdiction. Assuming that $\Gamma^A = \Gamma$, $\Phi = \omega\beta - [\Gamma + (1 - \omega)\rho\Gamma]$. Expanding only β , we have $\Phi = \omega(\pi\sigma + \pi M/\tau + \rho\Gamma) - [\Gamma + (1 - \omega)\rho\Gamma]$, $\Phi = \omega\pi\sigma + \omega\pi M/\tau + \omega\rho\Gamma - \Gamma - \rho\Gamma + \omega\rho\Gamma$, $\Phi = \omega(\pi\sigma + \omega\pi M/\tau) + \Gamma(2\omega\rho - \rho - 1)$. The expression $2\omega\rho - \rho - 1$ is always negative for ω and ρ between 0 and 1, which means that $\Gamma(2\omega\rho - \rho - 1)$ is also negative. In an ideal situation, the maximal benefit can be achieved if ω , ρ and π are maximised, as well as τ and Γ are minimised. This also means minimising all the cost-related factors like c , τ , δ , κ . Because ideal situations are difficult to achieve, a claimant must consider carefully all the factors in order to reach maximum utility. Considering the numerous factors and jurisdictions, at least in the EU, choosing a court seems to be extremely difficult.

accuracy, the duration of the litigation, the distance between the litigant's location and that of the court, the complexity of the case and the procedures, and the court's transparency and predictability. Considering these factors, the most attractive court for a claimant needs to offer fast proceedings, to have reliable and experienced judges that issue accurate decisions, to be near the claimant's location, to be transparent and predictable, and to have the tendency to favour the claimant. Which of these factors has the most power to influence the claimant must be considered on a case-by-case basis.

The analysis assumed that claimants behave as though lawyers and clients have the same interests. However, both have different interests and incentives. It can be argued that, left to their own devices, clients behave like the claimant in the above analysis, whereas lawyers are interested in high-stake law suits, in relatively lengthy litigations, in short distances between their client and the court, in complex cases and procedures, and in courts that favour claimants. High-stake litigation, lengthy proceedings, and complex cases and procedures increase lawyers' income, so they tend to prefer these types of cases. Meanwhile, lawyers that counsel clients from the same jurisdiction are interested in a short distance between the court and their home jurisdiction (bearing in mind that home jurisdiction are best for lawyers). This allows lawyers to maintain some influence over their clients. Lawyers from jurisdictions that welcome claimants are interested in predictable and transparent courts that help claimants better calculate their winning chances. Nevertheless, lawyers need a certain degree of legal uncertainty in order to maintain the demand for their services as well as a relatively high price for their services.

This unilateral choice of court demand instigated by the claimant should also generate a response from suppliers. The state as a supplier wants to meet the demand side's request for lower costs, more benefits, and more possibilities of winning for claimants. For example, a government can lower costs by reducing court fees, or by using a procedural language accessible by parties. Moreover, governments must also increase the success ratio for claimants. They can do this in two ways: one is to appeal to courts to favour claimants, and the other is to approve laws that increase the chances of claimants winning their cases. These steps need to be accompanied by an increase in the transparency and predictability of courts so that the success ratio can easily be calculated. However, it must be noted that court fees are a small part compared to those of lawyers. Hence, governments perhaps need to try to regulate the lawyers market in a way that reduces the burden they impose on clients, and thus make litigation in their jurisdiction less expensive. An even better strategy might be to tackle all these issues at the same time, and increase the overall attractiveness of the jurisdiction. The analysis in this section assumed that governments act following the signals

of a unilateral choice of court. Section 4.5.2 analyses competition from a bilateral choice of court, where a choice of court is made by both parties.

4.5.2 Competition from a bilateral choice of court

Competition from a bilateral choice of court can take place when the choice of court is made by both future litigating parties. Article 25 of the Brussels I (recast) Regulation is the most important provision as regards choice of court in the EU. The Article allows parties, regardless of their domicile, to choose any court or courts of Member States in order to resolve their present or future disputes, providing that the agreement complies with the requirements of this and other Regulation Articles.⁶¹⁵ Parties can choose the court before (ex ante) or after (ex post) the conflict arises. In ex ante situations, the conflict has not started. The parties do not know whether there will be a future litigation, they do not know the nature and the value of the future litigation, and they do not know their future position – they know only that they are entering into a contractual relationship with another party. A common example of this situation is that of two parties about to enter into a contract without knowing their future litigation position. In an ex post situation, the parties decide to choose a court after the conflict arises. In this situation, parties are sure that there is a conflict, they know the nature of the conflict, the value of the claim involved in the dispute, and their future position in front of the court. The information that parties possess and the point in time when they make their choice of court play an important role in their choice-of-court strategies.

To analyse how the choice of court is made in bilateral choice of court cases, the same path as for the unilateral choice of court is taken, and similar calculations are used. To simplify the analysis, it is assumed that clients and lawyers pursue the same interests,⁶¹⁶ and that the parties have the same bargaining power, have equal financial power, are equally concerned about the duration of the litigation before the court, and are charged similarly by their respective lawyers. Where appropriate to the analysis, certain departures from these assumptions are made.

The analysis focuses on parties that are interested in winning the litigation, and at the same time are trying to either minimise their costs, or maximise their benefits, or minimise their risk, or maximise their utility. Parties, however, can try to maximise or minimise two or more of the above-mentioned objectives, as will be discussed. The analysis first considers choice of court before the conflict arises,

⁶¹⁵ Chapter 3 offers an overview Article 25.

⁶¹⁶ On the relationship between client and lawyers, see also Section 4.3.3.

and later considers choice of court after it arises. The same examples used in Section 4.5.1 are valid in this section as well.

4.5.2.1 *Choice of court for cost-minimising parties*

In this scenario, the parties are equally interested in keeping the costs of litigation as low as possible. Some major sources of costs for both parties are lawyer's fees, together with distance- and administration-related costs. Court fees are another source. They are relative to the disputed claim, differ from jurisdiction to jurisdiction, and are paid by only one of the parties (the claimant).

From the breakdown of costs analysed in 4.5.1.1, the cost of a lawyer is equal to the hourly charges and eventual fixed charges. A lawyer's hourly rate depends on the complexity of the case and the procedures, as well as on the duration of the case. Based on the assumptions stated in the introduction to Section 4.5.2, these costs are roughly the same for both parties.⁶¹⁷ Therefore, to keep lawyers' costs down, both parties are interested in having speedy court proceedings and in reducing the complexity of the case and the procedures. This claim is valid for both ex ante and ex post situations.

Costs related to the distance between the litigants and the court are for travel, accommodation, and communication. Borrowing from the analysis in Section 4.5.1.1, travel costs and to a certain extent accommodation costs depend mostly on the distance between the location of the party and the location of the court. Accommodation costs depend mostly on the duration of the litigation. This means that travel costs and communication costs will be different for the parties, while accommodation costs will be similar. Obviously the party whose location is farthest from the court will incur more costs.⁶¹⁸ The reasoning does not change

⁶¹⁷ It is assumed that the parties have the same financial power, so they can afford the same category of lawyers. They have the same amount of time, and neither of them is under time pressure. In general, parties are assumed equal. Given that they are involved in the same case, the time and the complexity factor will be the same for both. Therefore, in the eventuality of a conflict, lawyer's costs for both parties will be almost the same. If lawyers costs are L_1 and L_2 for each party, hourly rates are hL , and fixed charges are iL , then $L = hL + iL$. Given that the hourly rates hL are a function of time τ , then $hL = f_L(\tau)$. This means that $L = f_L(\tau) + iL$. Based on the assumptions and because the duration of the litigation is the same for both parties, lawyers costs for both parties will be roughly the same, which means $L_1 = L_2$.

⁶¹⁸ Distance costs consist of travel costs (iD), accommodation costs (aD), and communication costs (cD). Travel and communication costs are functions of the distance (δ) between the litigant and the court, meaning that that $iD = f_{iD}(\delta)$ and $cD = f_{cD}(\delta)$. Meanwhile, accommodation costs are a function of the length of the litigation, and is equal for both parties, so $aD = f_{aD}(\tau)$. The distance for party one is δ_1 , while for party two is δ_2 . This means that the distance costs (D_1) calculation for party one is $D_1 = iD_1 + aD_1 + cD_1$ or $D_1 = f_{iD}(\delta_1) + f_{aD}(\tau) + f_{cD}(\delta_1)$; for party two the calculation is $D_2 = iD_2 + aD_2 + cD_2$ or $D_2 = f_{iD}(\delta_2) +$

for the ex ante and ex post situations. Both parties are equally incentivised to select a court that is nearby and that is fast.

Administration fees are another source of costs, and these are incurred by parties when litigating in a foreign jurisdiction. The main components of administrative costs are related to the certification of documents and to translation. Costs related to the certification of documents include, among others, costs of notarial acts and costs of stamps. Translation costs include those related to translating documents, evidence, contracts, and communications into a language accepted by the court. If the language of the contract and the court are the same, translation costs decrease or become almost zero. Translation costs are also affected by the complexity of the case and the procedures. The more complex the procedures or the case, the more documents are expected to be used, and therefore more translation is needed. Given that the complexity is equal for both parties, translation costs can be expected to be the same for both parties. As with translation costs, and for the same reasons, complexity can also affect the costs of document certification. Given that parties cannot control the complexity of the case, they can try to keep the costs low by choosing a court that uses the same language as that in the contract.⁶¹⁹

While drafting a contract and negotiating the choice of court, parties interested in minimising litigation costs are interested in a court that offers speedy proceedings, noncomplex procedures, procedures in a language used by the parties, and a forum near the location of both parties. With a fast court and noncomplex procedures, parties hope to keep lawyers' costs and administration costs low. Choosing a court that uses the same language as the parties keep administration costs low. Here it can be assumed that most of the cross-border commercial contracts are in English, French, or German. Therefore, cost-minimising parties are interested in a court that conducts proceedings in one of these languages. Distance is also a source of costs. When distance decreases for one party, it generally increases for the other. A compromise choice would be a court that is the same distance from both parties. However, this choice can be to the detriment of the quality or speed of the litigation, making equidistance an economically unsound compromise. It can be

$f_{aD}(\tau) + f_{cD}(\delta_2)$. Obviously, the party located farthest from the court will incur the most costs. This calculation remains the same for ex ante or ex post situations.

⁶¹⁹ Administration costs (A) consist of certification of documents costs (c_A) and translation costs (t_A). Both costs are affected by the complexity of the case or the procedures (κ), and increase the more complex a case – or procedures – becomes. Therefore $c_A = f_{cA}(\kappa)$ and $t_A = f_{tA}(\kappa)$. For both parties, these costs are comparable because the complexity is equal for both. However, translation costs can be reduced by choosing a court that uses the same language as the contract or the majority of the documents exchanged between the parties. This calculation remains the same for ex ante or ex post situations.

expected that parties will each propose their own best alternative, rejecting each other's proposal until they reach a compromise. A compromise court is not necessarily the best one, but is the best that accommodates both parties' needs. Moreover, a compromise court means that both parties incur the same costs. For cost-minimising parties, the court needs to – in terms of the costs for litigating in it – fall within the boundary of the maximal acceptable costs of each party.

An ex post choice of court situation might be affected by court fees. In this situation, parties can better predict who will be the claimant and who will be the defendant. The potential claimant can be expected to bear the burden of paying the court fees.⁶²⁰ Naturally, potential claimants are interested in a court with low fees. Initially, potential defendants will have no interest in court fees. However, careful defendants will be interested in a court with low fees, just in case they are involved in a counter claim or required to use court services. Again, juggling between different factors becomes even more difficult. As regards ex ante situations, parties are not aware of their future position, so they might disregard these cost-creating elements during their calculation. Nevertheless, given that court fees will always be potential costs for parties, they will consider a court with low fees.

To summarise, cost-minimising parties in ex ante and ex post situations are equally interested in choosing the following characteristics from a court: fast proceedings, relatively close to their locations, proficient in a language used by the parties, and using noncomplex procedures. Such characteristics will minimise lawyers' costs as well as distance-related and administrative costs. An issue of disagreement might be the choosing of a court that is equidistant. While this might be difficult, parties might accept marginally higher costs in exchange for a non-expensive court. In ex post situations, potential claimants have a strong interest in choosing a court that offers low court fees. In the end, cost-minimising parties will have to balance all the above-mentioned factors in trying to select the most suitable court.⁶²¹ Small companies can be good examples of cost minimising

⁶²⁰ In some countries – the Netherlands for example – both parties have to pay court fees.

⁶²¹ As analysed above, litigation costs are the sum of the court's fee (C), the lawyer's fee (L), distance costs (D), and administration costs (A). The court fee (C) is a function of the claim's value (σ) and the court's fee coefficient c . In ex post situations, the court fee is important primarily for the potential claimant. However, if the intention of the parties is to minimise costs, low court fees would fall within both parties' strategies. Lawyers' costs are comparable for both parties in ex ante and ex post situations, and depend on the timespan of the litigation (τ). Distance costs depend on the duration of the litigation (τ), and on the distance (δ) between the location of the parties and that of the court. To minimise costs, parties would be interested in shorter proceedings conducted in nearby courts. Administration costs are dependent on the complexity of the case and procedures (κ), and the language of the court. Courts using less complex procedures and proceeding in languages

parties, which in view of limited financial resources, focus their interest in minimising costs.

4.5.2.2 *Choice of court for benefit-maximising parties*

Benefit-maximising parties are assumed to be equally interested in winning the litigation and at the same time in maximising the benefits derived from this win. This analysis considers three sources of benefits. The first is the direct financial benefit; the second is the moral benefit; and the third involves benefits from cost shifting, which transfer some of the litigation costs from the winning to the losing party. As is proposed here, only the winning party derives benefits from litigating, meaning that benefit-maximising parties will think of themselves as future winners. The analysis also considers ex ante and ex post situations.⁶²²

used in international business or known by the parties, would contribute to the reduction of costs for parties and become interesting for cost-minimising parties. Therefore, $\Gamma = C + L + D + A$ or $\Gamma = c\sigma + [f_L(\tau) + iL] + [f_{iD}(\delta) + f_{aD}(\tau) + f_{cD}(\delta)] + [cA + f_{iA}(\kappa)]$. If parties are equal, an ideal court should give $\Gamma_1 = \Gamma_2$, but this might be difficult. Chances are that $\Gamma_1 \approx \Gamma_2$, where both Γ_1 and Γ_2 are within the boundaries of the accepted minimal costs for each party.

In an ex ante situation, the cost for the parties will be $\Gamma = [f_L(\tau) + iL] + [f_{iD}(\delta) + f_{aD}(\tau) + f_{cD}(\delta)] + [cA + f_{iA}(\kappa)]$. According to this calculation, the only difference between parties is the distance from the court. An equidistant court might be good solution to have comparable costs for both parties; however, compromising on the distance might increase other costs. It can be expected that parties will propose their best alternatives to each other until their preferences meet.

Ex post parties are aware of the conflict they are involved in, and can predict their role in the possible litigation. For the potential claimant, the costs related to litigation are $\Gamma_p = C + L + D + A$ or $\Gamma = f(\sigma) + [f_L(\tau) + iL] + [f_{iD}(\delta_p) + f_{aD}(\tau) + f_{cD}(\delta_p)] + [cA + f_{iA}(\kappa)]$. Costs for the potential defendant are $\Gamma_d = L + D + A$ or $\Gamma = [f_L(\tau) + iL] + [f_{iD}(\delta_d) + f_{aD}(\tau) + f_{cD}(\delta_d)] + [cA + f_{iA}(\kappa)]$. It is assumed that only the claimant pays the court fee, which means that for the defendant $f(\sigma) = 0$. Timespan (τ) and complexity (κ) are the same for both parties. Both parties would try to minimise τ and κ . However, the distance between the parties and the court (δ_p and δ_d), and the court fee coefficient (c) for the potential claimant, creates a situation where parties have different costs for the same court. Therefore, parties will have different preferences regarding courts. Parties interested in making a choice of court will settle for a compromise choice. In other words, for a choice that tries to equalise the costs, while at the same time trying to minimise them.

Considering ex ante and ex post situations, the most important elements for cost-minimising parties choosing a court are distance, complexity of the case and the procedures, language of the court, court fee, and duration of the litigation.

⁶²² This scenario assumes the parties want to win the case and to maximise benefit at the same time. Benefit maximising parties consider only the benefits of winning the case. As analysed in 4.5.1.2, benefits (β) are of a financial, moral, and cost-shifting nature. Financial benefits are $\pi\sigma$, where π is the accuracy coefficient of the court and $0 \leq \pi \leq 1$, while σ is the value of the claim. Moral benefits are $\pi M/\tau$, where M is the moral claim and τ is the length of the litigation. Cost shifting benefits are $\rho\Gamma$, where ρ is the cost-shifting coefficient, and $0 \leq \rho \leq 1$, and Γ are the costs incurred during the litigation. This means that $\beta = \pi\sigma + \pi M/\tau + \rho\Gamma$.

Financial benefits depend on the value of the claim and on the accuracy of the court. In ex ante and ex post situations, parties are equally interested in the court's accuracy, regardless of their future position. Both parties benefit from a court that accurately accepts the claim if they are claimants or accurately rejects the claim if they are defendants.⁶²³ Furthermore, moral benefits depend on the duration of the litigation and the accuracy of the court. The longer the litigation, the more the moral benefits decrease, and the more accurate the court, the higher the moral benefit. In both ex ante and ex post situations, parties are interested in fast proceedings and accurate courts. The third source of benefits for litigants comes from cost shifting. Cost shifting transfers part of the winner's costs to the losing party, and depends on the cost-shifting coefficient and the costs related to that jurisdiction. Assuming that ex ante parties think of themselves as winners, they are equally motivated to choose a court that offers high cost-shifting coefficients. Ex post parties can predict their future position, along with some of the costs associated with the case. In view of this, parties consider the best combination to maximise their benefits.⁶²⁴

Benefit-maximising parties are assumed to consider three kinds of benefits: namely, financial, moral, and cost-shifting. This assumption implies that parties consider only litigation scenarios where they emerge as winners. Large companies

⁶²³ In an ex ante situation, parties are not aware of the conflict, their position in the future, and the financial or moral value of the claim. However, parties know that any future litigation will have a financial and a moral value, meaning that in any future litigation $0 < \sigma$ and $0 < M$. To maximise their benefits, parties will be interested in high π and low τ . In other words, parties will be interested in accurate and fast courts. Cost shifting consists of costs incurred ($\Gamma = f(\sigma) + [f_L(\tau) + iL] + [f_{ID}(\delta) + f_{AD}(\tau) + f_{CD}(\delta)] + [cA + f_{IA}(\kappa)]$) adjusted by the cost-shifting coefficient (ρ). Given that parties are interested in benefit maximisation, they will be interested in courts that offer comparatively more cost shifting. Considering the analysis about financial, moral, and cost-shifting benefits, it can be said that parties will be equally interested in a fast and accurate court, which at the same time has a comparatively high cost-shifting coefficient.

⁶²⁴ In ex post situations, parties know the conflict they are involved in, know the financial and moral value of the conflict, and can predict their future position. From the claimant's perspective, the financial benefit will be $\pi\sigma$, while the moral benefit will be $\pi M_p/\tau$, where M_p is the moral value of the case for the claimant. For the potential defendant, there is no financial benefit, because the claim is made by the claimant (so $\sigma = 0$), while the moral benefit will be $\pi M_d/\tau$. The cost-shifting benefit for the potential claimant will be $\rho\Gamma_p$, where Γ_p is the litigation cost for the claimant. The cost-shifting benefit for the potential defendant will be $\rho\Gamma_d$, where Γ_d is the litigation cost for the defendant. From the analysis, financial, moral, and cost-shifting benefits seem to be different for both parties. For the potential claimant, benefits will be $\beta_p = \pi\sigma + \pi M_p/\tau + \rho\Gamma_p$, while for the potential defendant benefits will be $\beta_d = \pi M_d/\tau + \rho\Gamma_d$. Clearly, benefits for the parties are different in terms of sources and magnitude. However, some factors (π , τ , ρ) influencing the benefits for both parties are the same. It can be said that ex post benefit-maximising parties are equally interested in a fast and accurate court, and that has a comparatively large cost-shifting coefficient.

with considerable resources or repeat players that can spread costs over many litigations, are good examples of benefit maximising parties. Based on these assumptions, ex ante benefit-maximising parties prefer to choose an accurate and fast court, which at the same time shifts a large number of litigation costs to the losing party. Ex post benefit-maximising parties have a better idea with regard to the conflict and their position in it, and have the same incentives as ex ante parties: namely, fast and accurate courts. However, knowing the case at hand, potential claimants are interested in a court that offers a better combination of claim value with court accuracy. The problem here is that diverging interests between parties might become an obstacle to reaching an agreement. To overcome this, ex post parties might choose a compromise court that is not the best in terms of benefit maximisation but is acceptable for two parties with slightly different incentives. It is also true that in practice ex post choice of court cases are rare. The reason for this might be the aggravated situation between the parties, but also what they consider when choosing a court. Clearly, even if parties are interested in maximising their benefits, the elements that maximise their benefits are different, and are also reflected in the different interests of the parties.

4.5.2.3 *Choice of court for utility-maximising parties*

In Section 4.5.2.2, parties were assumed to consider themselves as winners and trying to maximise their benefits. However, while success and benefits are not always guaranteed, costs persist in both victory and defeat situations. In view of this, some parties consider maximising their utility. Utility is the difference between the potential benefits of litigating in a jurisdiction and the potential costs for litigating in that jurisdiction. Potential benefits are the benefits as analysed in Section 4.5.2.2, adjusted by the success ratio. Potential costs are those incurred inevitably during litigation in addition to costs shifted by the other party in the event of litigation loss. The success ratio is the ratio between similar cases won by a particular party (claimant or defendant) and the total number of similar cases adjudicated by the court.⁶²⁵ The success ratio for the claimant is equal to the defeat

⁶²⁵ This scenario assumes that parties are interested both in winning the case and in maximising their utility. Utility (Φ) is the difference between the possible benefits and the possible costs of litigating in a jurisdiction. All the benefits of a jurisdiction, calculated in the previous section, adjusted by the success ratio in that jurisdiction create the potential benefits. The success ratio is the ratio between similar cases won by similar claimants, and the total number of similar cases adjudicated by a given court ($\omega = n_p/n_t$), obviously $0 \leq \omega \leq 1$. In this analysis, the success ratio (ω) of the claimant is used. This means that potential benefits would look like: $\omega(\pi\sigma + \pi M/\tau + \rho\Gamma)$. The possible costs are the sum of all the unavoidable costs and the possible costs shifted from the other party in the event of litigation loss. Assuming that the costs of both parties are Γ , the possible costs of litigation are $\Gamma + (1 - \omega)p\Gamma$, where Γ are unavoidable litigation costs, $1 - \omega$ is the non-success ratio, and p is the

ratio for the defendant and vice versa. In the following analysis, success ratio refers to the success ratio of the claimant. For an accurate estimation of the success ratio, courts need to be transparent and predictable, as this allows parties to collect the data they need from the court, and to accurately predict its decision.

Parties in ex ante situations are not aware of the conflict they might become involved in, or of their future position in the dispute. Moreover, parties are not aware of the costs they will incur in a potential litigation. To maximise their utility, parties are interested in maximising their benefits and in minimising their costs, combined with a high success ratio. To maximise their possible benefits, ex ante parties are equally interested in accurate and fast courts. To minimise their potential costs, the court should be fast and inexpensive, located close to the parties, offer noncomplex proceedings, and use the same contractual language as the parties. Regarding success rate, parties unaware of their positions are interested in choosing a neutral court, which offers claimants and defendants the same success ratio. Given that parties are unaware of their future position, it can be expected that they wish to avoid choosing a court that in the future will be more favourable to their adversaries. And because the parties are interested in a neutral court, and are not sure about the conflict in which they will be involved at some future time, it is reasonable to think that ex ante parties are interested in low cost-shifting coefficients. The choice of court becomes very difficult for a party trying to balance his own interests and at the same time negotiating with a party who has the same pressing needs.⁶²⁶

In ex post situations, parties are aware of the conflict and can predict their future position. Also here, any utility-maximising party is interested in maximising his benefits while minimising costs. Benefits and costs are different for claimants and defendants, and it can be expected that negotiating parties will each propose their favoured options until they agree on a common choice. It is reasonable to think that both the potential claimant and the potential defendant will not agree on a court that appears to favour the other party. Therefore, parties tend to favour a

cost shifting coefficient of the court. Considering this, the utility of the court can be expressed as $\Phi = \omega(\pi\sigma + \pi M/\tau + \rho\Gamma) - [\Gamma + (1 - \omega)\rho\Gamma]$.

⁶²⁶ In ex ante cases, parties are unaware of the future conflict, the value of the conflict, and their eventual position. Their potential utility will be $\Phi = \omega\beta - [\Gamma + (1 - \omega)\rho\Gamma]$, or borrowing from the analysis in Section 4.5.1.4, $\Phi = \omega(\pi\sigma + \omega\pi M/\tau) + \Gamma(2\omega\rho - \rho - 1)$. The parties will be equally interested in high court accuracy (π), fast proceedings (τ), short distances from the court (δ), and noncomplex procedures (κ). Being uncertain about their future role in the litigation, parties will try to choose a court that is neutral ($\omega = 0.5$), but if the court tends to favour one of the parties ($\omega \neq 0.5$), they will prefer low cost-shifting coefficients so they do not incur unpredictable costs. Finding a balance between all the elements listed here and negotiating with another similarly exigent party makes choice of court a difficult process that should not be underestimated.

neutral court and to choose their compromise court from among the neutral ones. Naturally, to maximise benefits, parties are interested in accurate and fast courts that have high cost-shifting rates. To minimise costs, parties are interested in fast courts, located relatively close to their location, having noncomplex procedures, and using the same language as the parties. As regards success ratio, a party chooses a court that offers a high cost-shifting coefficient if chances of winning are high, and a low cost-shifting coefficient if chances are low. It is clear that only a coincidence might allow the parties to choose the court that offers both of them maximal utility. Most probably they will have to settle for a compromise court.⁶²⁷ However, it should be noted that if parties are aware of the conflict, they can also predict which court will have jurisdiction. In knowing this, each party can calculate their utility in this court and use it as a benchmark during the negotiation. For example, if party A and party B are involved in a conflict, they can predict that Court X has jurisdiction. Their utility from Court X is a and b, respectively. During choice of court negotiations, they will accept only the one that offers a utility higher than a and b at the same time. This complex calculation should be added to the already complicated situation between the parties. Therefore, it is no surprise that ex post choice of court is rare.

This analysis assumes that some parties try to maximise their utility when making a choice of court. Utility is the difference between potential benefits and potential costs in a jurisdiction, and costs and benefits are adjusted by the success ratio of a particular jurisdiction. In ex ante situations, parties are not aware of the future conflict, the value of the conflict, or their position in the litigation. Given the

⁶²⁷ In ex post situations, parties are aware of the conflict, its value, and their potential position before the court.

The utility that the potential claimant derives from the conflict is $\Phi_p = \omega\beta_p - [\Gamma_p + (1 - \omega)\rho\Gamma_d]$ or $\Phi_p = n_p/n_t (\pi\sigma + \pi M_p/\tau + \rho\Gamma_p) - [\Gamma_p + (1 - n_p/n_t)\rho\Gamma_d]$. The utility for the potential defendant is $\Phi_d = (\omega - 1)\beta_d - [\Gamma_d + \omega\rho\Gamma_p]$ or $\Phi_d = [(n_p/n_t) - 1] (\pi\sigma + \pi M_d/\tau + \rho\Gamma_d) - [\Gamma_d + (n_p/n_t)\rho\Gamma_p]$. It is clear that success ratio (ω), moral benefits (M), and costs Γ create differences in the utility of claimants and defendants. Therefore, the potential claimant and the potential defendant will have different preferences for courts. When negotiating the choice of court, parties can be expected to try to aim for a high level of success ratio, and at the same time to negate any success ratio advantage for the other party. It can be expected that the only court acceptable for both parties will be a neutral one ($\omega = 0.5$), as this will give both parties equal possibilities of winning. Therefore, ex post utility-maximising parties can be expected to first consider the neutrality of the court, and then to maximise the difference between benefits and costs.

The alternative to choosing a court in ex post situations is to apply the private international law rules and find the competent court. Each party can compare the utility derived from an assigned court and the utility of a negotiated court. If the utility of the negotiated court is higher than that of the assigned court for both parties, it is reasonable to think that they will choose to negotiate. However, parties might be reluctant to negotiate if the conflict is so great that they have lost interest in communicating with each other.

latter, they can be expected to choose a neutral court, in order to avoid any uncomfortable position in the future. From among the neutral courts, parties can be expected to choose the one that will maximise their utility. In view of this, the best court should have the following characteristics: transparency, predictability, accuracy, fast proceedings, noncomplex procedures, proximity to the parties, and use the same language used between the parties. In ex post situations, parties are aware of the conflict, its value, and their future position. Each party is interested in a court that maximises his success ratio. However, during negotiations, no party is inclined to give the other more opportunities to win. Hence, parties will likely settle for a neutral court. Once they agree on a neutral court, the reasoning is similar to the ex ante situation. Both situations, although different, incentivise the parties to choose the same court characteristics by taking different paths. Ex post negotiations may not be considered easy, and parties involved in a conflict might for many reasons be reluctant to negotiate with each other. The analysis here looked at parties that are still able to negotiate and are trying to agree on a court.

4.5.2.4 Concluding remarks

This section offered an analysis of the choice of court in bilateral choice of court situations. Bilateral choice of court, a part of the broader process of court adjudication competition, is a situation in which two parties choose the court that will adjudicate their conflict. Choice of court can be made in two situations: namely, before the conflict has started (ex ante) and after the conflict has arisen (ex post). To simplify this analysis, each party is assumed to want to win the case, and at the same time to try to either minimise costs, maximise benefits, or maximise utility. Other potential interests of the parties, such as intentional delay, future reputation, future relationship, economic and bargaining power, and extra-legal interest were not considered.

Section 4.5.2.1 analysed choice of court for cost-minimising parties. The analysis did not take into account any reduction of costs for repeat players in a particular jurisdiction. In both ex ante and ex post situations, parties prefer courts that offer low court fees (ex post defendant is not interested in this), fast proceedings, noncomplex proceedings, and are near each party's location. Complexity of procedures is also related to the speed of litigation: the more complex the procedures, the more time the proceeding is likely to take. Difference in language is another source of costs for parties. A court that uses the same language in which the parties are contracting is more convenient for them. Different courts offer these elements in varying degrees. While some of the cost elements are absolute and apply equally to all parties, other elements are relative and depend on the parties, such as distance from the court and the language of the court. Therefore, the court where one party minimises its costs the most does not necessarily coincide with the court where the other party minimises its costs. During their

negotiation on choice of court, parties can be expected to propose their second or third best option to each other until their preferences meet. This means two things. First, litigation costs are not always related only to the characteristics of the court but also to its proximity to litigants. For example, litigating in Portugal might be less expensive, but the cost differences for a Spanish and an Estonian party might be a reason for not choosing that court. Second, and as a consequence of the first, less expensive courts will not be the default choice of parties, since other elements/factors are instrumental.

A second situation analysed was choice of court for benefit-maximising parties. It is assumed that parties consider themselves to be winners, so they are only interested in maximising their benefits. This assumption considers *ex post* situations, in which one of the parties is expected to lose and therefore has incentives that are different from those of the other party. Benefits consist of financial and moral benefits, and of costs shifted to the other party. Financial and moral benefits are directly related to the court's accuracy. *Ex ante* and *ex post* parties, regardless of their position, are equally interested in this aspect. A court's accuracy depends on its independence, and on the quality and experience of its judges. Benefit-maximising parties are interested in courts that offer a better combination of these characteristics. Because a moral benefit is inversely related to the duration of the litigation, parties are interested in a court that offers speedy proceedings. The benefits of cost shifting depend on the costs incurred in one jurisdiction and on the costs-shifting coefficient of its court. A benefit-maximising claimant is interested in finding a good balance between maximising costs and cost-shifting coefficients. The interest of the benefit-maximising parties seems to coincide, which suggests that agreeing on a court might be relatively easy for these parties.

A third situation analysed involved utility-maximising parties. Utility is the difference between possible benefits and possible costs of litigating in a jurisdiction. Possible benefits are those that can be acquired from a jurisdiction adjusted for its success ratio. Possible costs are the sum of the unavoidable costs and possible costs in the event of defeat. Possible costs in the event of defeat are those shifted from the winning party adjusted for the defeat ratio in that jurisdiction. Parties assess a court's success ratio in different ways, and the higher the transparency and the predictability, the easier it is to assess. Therefore, for utility-maximising parties, a court's transparency and predictability are very important elements. In this analysis, the success ratio of the claimant was considered, this being the ratio between similar cases won by similar claimants and all the similar cases decided by the same court. Utility-maximising parties are expected to maximise their possible benefits and to minimise their possible costs. However, the more the success ratio increases for one party, the more it decreases

for the other. Parties in *ex ante* situations can be expected to choose a neutral court to avoid any inconvenient situation in the future, while at the same time trying to maximise their possible benefits and to minimise their possible costs. Parties in *ex post* situations know their position in the conflict. They can predict which court has jurisdiction over their conflict, based on private international law rules, and predict what their utility is in this jurisdiction. This serves as a benchmark during negotiations with the other party regarding choice of court. For the negotiation to be successful, parties need to choose a court that offers each of them higher utility than the court assigned by private international law rules.

The analyses, however, did not consider complicated cases in which parties have different interests. For example, one party tries to minimise its costs while the other tries to maximise its benefits. Regardless of what parties choose to maximise or minimise, the duration of the litigation, the complexity of the procedure before the court, the distance between parties and the court, the success ratio, and the language of the court will always be important.

In real life, choice of court can also be influenced by factors not considered here. For instance, one of the parties might be interested in obstructing the litigation by choosing a slow court. Or parties might choose one court out of habit rather than on its merits. Other strategic moves can also influence the parties: for example, its presence in one market, or an interest in the precedents in one jurisdiction. The analysis was based on certain assumptions. First, it was assumed that parties' bargaining power is equal, which means that no party is powerful enough to impose its choice on the other. However, bargaining power is often imbalanced, and it can be expected that dominating parties will impose their preferences on weak ones. The dominating party's preferences resemble the unilateral choice of court analysed in Section 4.5.1, despite the fact that two parties are involved in the choice making. Second, the analysis assumed that lawyers and clients have the same interests and pursue the same goals. However, the major concern of lawyers is to maximise their profit while minimising their effort. As analysed above, supposing that lawyers benefit from lengthy proceedings, complex procedures, and inaccurate courts, their suggestions would be in conflict with the interests of the parties. Here again, the lawyer-client relationship and the characteristics of the case play a role. Chapter 3 and Section 5.3 in particular provide empirical evidence with regard to the court preferences of lawyers working in Europe's largest law firms. A survey conducted for this research provided data not only on jurisdiction preferences but also on the most preferred elements with respect to these jurisdictions and to court systems in general.

The analysis in this section focused on the demand side of the civil justice system market. The findings of the analysis are important to both academics and

governments as suppliers of this market. Competing jurisdictions must do their best to accommodate parties' preferences, while parties express their own preferences by choosing a court. Governments therefore need to consider limiting litigation time, simplifying procedures, increasing the transparency and predictability of the courts, and reducing court fees or making litigation less expensive in general. However, governments have many objectives listed according to their social or political priority: for instance, infrastructure, public health, emigration, and defence. Hence, while accommodating the demand side's preferences and facilitating litigation for international litigants, governments try to consider where this objective stands in comparison to others. Balancing objectives and finding the right priority is a challenging economic, social, and political responsibility. Striking the right balance between different objectives seems to be a common denominator for litigants, lawyers, and governments.

4.6 Conclusions

This chapter discussed elements of the market and the competition regarding civil justice systems, as well as two types of court adjudication competition, and Section 4.1 discussed the civil justice system market, Section 4.2 analysed the kind of good traded in this market, and Sections 4.3 and 4.4 examined the characteristics of the demand and the supply side of the market, respectively. Section 4.5 presented a dissection of the competition from a unilateral and bilateral choice of court, focusing more on the elements considered important by the demand side during negotiations on choice of court.

The market

The analysis of the civil justice system market in Section 4.1 focused on party autonomy, forum shopping, market characteristics, and incentives to compete. Party autonomy is of vital importance for the existence of the justice system market, which depends on the ability of the demand side to choose from among different offers, while the ability to choose depends on the autonomy of the demand. Over time, party autonomy has come to mean that any person is free to choose any legal arrangement considered appropriate. In private international law, party autonomy means that any person has the right to choose the law and court best suited to his purposes. Understandably, party autonomy is limited, with these limitations aimed at protecting weak parties or government prerogatives, as analysed in Chapter 3. These restrictions must be seen as defences to protect weaker parties against abuses of power by stronger parties, which could result in unfair restrictions of party autonomy. Party autonomy is also constrained by other forces operating in the market. Section 4.1.1.1 focused on two of these: namely, bargaining power and information asymmetry. Bargaining power can be understood as the ability to influence the outcome of a negotiation. In a

negotiation, the party with the greatest bargaining power imposes its will on the other, effectively neutralising the latter's autonomy. A party that has more or better information than the other has a similar advantage. Information asymmetry and bargaining power are good examples of the fact that while parties have autonomy, its quality and quantity is imbalanced, and it influences the outcome of negotiations. For the civil justice system market, this means that certain actors having superior bargaining power and information can impose their will to the extent that it negates the preferences of the other parties.

Using party autonomy to choose a court, negotiating parties create the premises for forum shopping. Section 4.1.1.2 argues that forum shopping is a strategy commonly used by lawyers, and the term has acquired an undeserved negative connotation. The use of forum shopping to frustrate weaker parties, or to impede a fair course of justice, has unfortunately tarnished its reputation. These negative uses, however, should not incite law-makers to rush legislation that limits forum shopping. The *Italian Torpedo* and *lis pendens* are good examples of problems related to the strategy, which were resolved without restricting forum shopping or party autonomy. Hence, rather than throwing the baby out with the bath water, it is better to separate them, and to help forum shopping serve our needs more effectively.

The civil justice system market is distinguished by its specific characteristics. These features, analysed in Section 4.1.1.3, are supplier bankruptcy, relation to other markets, price, and type of good being traded. One of the most important characteristics is the absence of risk that suppliers will go into bankruptcy. This means that even in a situation of deep crisis, some form of civil justice organised by the government will exist. Given this reason, suppliers seem to be unresponsive regarding incentives to increase efficiency and innovation. The analysis considered that, if this lack of response is true, incentives for governments to participate in the civil justice system market should come from outside of the market. The civil justice system market is connected to other markets that influence both demand and supply, and the price of goods is not a result of the supply-demand interaction. Governments set this price arbitrarily, and it tends to be lower than the real value of the good. Reasons for this price setting are to be sought in the kind of good the justice system produces, and in the incentives received by the market.

The good in the market

The analysis in Section 4.1.1.3 and 4.1.1.4 suggested that governments' incentives to innovate do not come directly from the civil justice systems market. It was suggested that they need to come from other sources, and one of these can be the good offered in this market. In particular, the good encourages governments to

maintain, support, and innovate for reasons not related to the market. Section 4.2 examined civil justice systems as a good. The analysis was divided into two parts, with the first providing an overview of the classification and definition of goods. Considering their excludability and rivalry, goods can be divided into private and public goods. Some, however, are considered public goods despite lacking this category's characteristics. These goods are usually of social significance, and depriving even a small part of society of these goods would amount to social injustice and threaten social peace. Governments therefore eliminate any rivalry or excludability from these goods, effectively making them similar to public goods. The attempt by governments to change the nature of these goods is a political act, and therefore these goods should be labelled *political public goods*. Clarifying the difference between public goods and *political public goods* is important for the analysis in the second part. The private-public good dichotomy is often referred to when the civil justice market is being described, but this classification has certain problems. To overcome these, it was submitted that the term 'merit goods' would describe court adjudication or the civil justice system in general better than the public good-private good duo. Merit goods are values created during a historical interaction process among individuals, and is subsequently transmitted as community values. The concept of civil justice systems is an important social value, which helps peace to be maintained. Considering it as a merit good leads to a better understanding of the role of the governments in dealing with civil justice systems and their behaviour in the market.

The second part of Section 4.2 analysed the civil justice system as a good, and how its characteristics influence and are influenced by the competition among systems. The analysis showed that the system is a bundled good, and that court adjudication is the most important good in the bundle. Moreover, court adjudication is a bundled good, and includes dispute resolution, law creation, and legal education. Of these, dispute resolution is the most important for the demand side. The general agreement is that court adjudication as a bundle is a public good. However, a careful analysis shows that courts as a good do not fall within the definition of public goods. Court dispute resolution is not much different from other dispute resolution mechanisms used in many societies. The public good label applied to court dispute resolution seems to be a political act, which means that courts should be better understood as political public goods. As mentioned previously, an even better categorisation of courts would be merit goods. The merit good classification better indicates the social value of court dispute resolution, and therefore better justifies the role of the government as its supplier.

Governments that act as suppliers in the civil justice system competition risk disrupting the harmony between the goods bundled in court adjudication. Section

4.2.3 submits that competing governments would be more interested in developing and focusing resources on dispute resolution. The remaining goods in the bundle would be left to other suppliers to produce and develop. Law-making would focus on the parliaments, and legal education would concentrate on educational institutions. This scenario involves intense competition where most of the demand side is composed of non-repeat players, in which case governments would be incentivised to maintain the bundle as is, and to develop simultaneously all the goods within the bundle.

The demand side

The civil justice system market is created by the interaction between the supply and the demand. Section 4.3 analysed the demand side, with a particular focus on its characteristics and composition, and on the relation between its different components. The demand side is composed of litigants or potential litigants that, based on private international law rules, are able to litigate outside their own jurisdictions. Natural and legal persons can be part of the demand side, and for the demand side to have qualitative output, litigants should exercise their choice of court uninhibited by practical and psychological factors. While some psychological factors have been discussed in detail in Section 2.5, Section 4.3.1.2 provides an analysis of practical factors related to mobility. A functional demand side should be mobile enough to move for litigation purposes from one jurisdiction to a jurisdiction of choice. Mobility is affected by legal possibilities, by parties' knowledge regarding other jurisdictions, by parties' financial ability, and by the availability of lawyers. The analysis showed that wealthy litigants are the most mobile actors, able to invest resources in acquiring knowledge and in lawyers in order to increase their mobility. This implies that large companies or wealthy individuals are the most mobile and probably the most active actors.

Lawyers are one of the factors able to increase the mobility of a litigant. Lawyers as professionals specialised in law not only help litigants to be more mobile but are pivotal to the results of the litigation. There exists a clear distinction between lawyers of wealthy and less wealthy clients. It can be expected that lawyers of wealthy clients are interested in the competition of civil justice systems, and use their lobbying power to induce governments to compete. Lawyers exercise considerable power over their clients, which often weakens their ability to make legal choices, and allows lawyers to impose their own strategies. Section 4.3.3 showed that lawyers' source of power resides in the type of market and the characteristics of the service they offer. The lawyers market is stratified to represent the wealth of their clients, and in each strata, a superstar kind of market emerges, which resembles a monopoly type of market. This means that clients of a certain wealth are trapped within a particular market level, where differences in

prices do not justify differences in quality. The ‘superstar’ lawyers in each strata act as monopolists, which gives them the possibility of inflating prices.

Lawyers have considerable power over their clients, due to the nature of their services: namely, the entropic nature of legal reasoning, the credence good characteristic, and litigation’s similarity to a sunk-cost auction. The reasoning of a legal professional is inevitably entropic, which means that the more time that passes, the more complex the reasoning becomes, thus undermining the value of clients’ past experiences, and making them dependent on lawyers. This dependency is increased even more by the credence good characteristics. Credence goods are produced by experts, and the consumer faces difficulties in assessing his own needs with regard to quality and quantity. Markets with these kinds of goods are characterised by high prices and fraud. Lawyers use this characteristic to charge high fees, and as a result they create sunk costs, which are difficult to recover or transfer, and that serve as a mechanism to lock the supplier and the consumer together. Furthermore, litigation is a sunk-cost auction, where two parties – claimant and defendant – invest considerable resources hoping to win and to have some of the investment returned. These characteristics result in lawyers having tremendous power, and being able to impose legal strategies on their clients, to impose high fees, and – more important for this research – to decide the choice of court.

The supply side

The analysis showed that lawyers have considerable power over their clients and, as a consequence, over the output of the demand side in the civil justice system market. Section 4.3.4 concludes that it is in lawyers’ interest to increase their revenue by expanding their market beyond the borders of their jurisdiction. Thus, lawyers as a group are interested in the competition of civil justice systems. However, lawyers are also interested in avoiding competition from lawyers outside of their jurisdiction. As a powerful lobbying group, lawyers are expected to push governments in these two directions: first, to expand the market beyond the national borders, and second, to restrict foreign lawyers’ access to the market. Governments are the supply side, which means all the state bodies that produce goods on offer, along with courts, parliaments, and executives, produce important elements relating to the market. Section 4.4.3 analysed the incentives that these state bodies and governments in general have to participate in the competition. There appears to be no direct economic incentive for governments to compete, since given that courts are mostly subsidised, they do not make a profit. Judges have some incentive to compete, as their decisions might travel beyond the borders of their jurisdiction and their name become known. Apart from this reason, however, the other incentives should be indirect. It was submitted that some of the indirect incentives for governments would be an increase in taxation

revenue and in investment. A competitive jurisdiction would increase the taxable profit for local lawyers, which would increase taxation revenue for the government. Competitive legal institutions are also attractive to business and to investors. Investments increase social welfare, which increases revenues for the government, but most importantly makes voters happy. Indirect benefits need careful consideration, however, because they are relatively easy to identify but difficult to calculate. It is not surprising that many governments are not able to see what benefits they might derive by participating in the civil justice system competition. Chapter 5 provides insights into the economic significance of the legal market for some jurisdictions, and their attitude towards the competition of civil justice systems.

Competition from a unilateral and bilateral choice of court

The last section in this chapter analysed litigants' choice of court preferences in different situations. The aim of the analysis was to discover some of the elements that influence the choice of court process. Section 4.5.1 considered situations where choice of court is made by the claimant. Given that the choice is made unilaterally, this situation can be called unilateral competition. The analysis assumed that the claimant is interested in winning the case and at the same time in minimising costs, maximising benefits, or maximising utility. Cost-minimising claimants choose the court that most lowers their litigation costs. Litigation costs were calculated to be dependent on the court fee, the duration of the litigation, the distance from the court, and the complexity of the laws and the procedures. A cost-minimising claimant will choose a court that offers low court fees, fast litigation, is close to the claimant's location, and has noncomplex laws and procedures. Another assumption is that claimants try to maximise their benefits. Benefits consist in the financial and moral benefits of winning a case, and in costs being shifted to the losing party. Benefits depend on the court's accuracy, the duration of the litigation, and the court's cost-shifting coefficient. A benefit-maximising claimant chooses a court that is accurate, fast, and has a high cost-shifting coefficient. The final situation considered was that of a utility-maximising claimant. Utility is the difference between all the possible benefits and possible costs of litigating in a jurisdiction. These benefits and costs depend on the same elements considered above, with the addition of the court's success ratio. Obviously, a utility-maximising claimant is interested in choosing a court that offers a high success ratio in addition to maximising benefits and minimising costs.

Section 4.5.2 considered situations where choice of court is made by both the defendant and the claimant. Given that the choice is made by both parties, this situation can be called bilateral choice of court. It was assumed that both parties have the same bargaining power and the same interests regarding the dispute.

Parties can choose the court in two situations: before (ex ante) and after (ex post) litigation has started, with potential differences in the choice of court process. Again, the analysis assumed that the parties are simultaneously interested in minimising costs, maximising benefits, or maximising utility. The choice preferences of cost-minimising parties in both ex ante and ex post situations are the same. Both parties will choose a court that offers fast litigation, low court fees, noncomplex laws and procedures, and that is a short distance from the location of the parties. Two issues should be underlined here: first, the distance between court and parties is not the same. Therefore, parties need to compromise for a court that is equidistant; second, agreeing on an equidistant court compromises the other factors. As a result, finding the appropriate court becomes very difficult. It can be assumed that the court chosen by the parties will not always be the one that offers minimal costs. The second assumption was that both parties try to maximise their benefits. Benefits depend on the court's accuracy, the length of the litigation, and the court's cost-shifting coefficient. In ex post and ex ante situations, both parties are interested in a highly accurate and fast court. As regards cost shifting, ex ante parties prefer a high cost-shifting coefficient to maximise their benefits, but ex post parties prefer a higher or lower cost-shifting coefficient, depending on their position in the litigation. The third assumption involved cases in which parties try to maximise their utility. Utility is the difference between possible benefits and possible costs adjusted by the success ratio in that jurisdiction. In both ex ante and ex post situations, parties are interested in a court that does not offer advantages to either the claimant or the defendant. A neutral court would better suit the interests of both parties. However, reality is more complex. Parties need to take several factors into account when making a choice of court, and while a court might excel in one of them, the court chosen will on average have a better overall score.

Section 4.5 provides a clear list of factors that parties consider when making a choice of court. Some of the elements are even more complex than they look. Court fees include not only the upfront fee that is paid to the court but also other court costs incurred during litigation. The complexity of the procedures or the law relate also to the differences in language between the parties and the court. Courts that try to be attractive must also try to employ the language most used by parties: namely, English. Court accuracy is closely related to the quality, experience, and independence of judges. Finally, a success ratio also depends on a court's transparency and predictability. The more transparent and predictable that courts are, the better the parties can calculate their success ratio. However, Section 4.5 is mostly theoretical. Empirical data would provide valuable information irrespective of whether these predictions were true in real life. Chapter 5 takes on this task by analysing data from the European Justice Scoreboard on the situation regarding legal systems in the EU, as well as data involving a survey on the court

preferences of lawyers in the EU. These data are combined with the theoretical findings discussed in this chapter.

Chapter 5 An empirical overview of the civil justice system competition in the EU

Chapter 4 contains a theoretical analysis of the market, the good, the demand, and the supply with respect to the civil justice system competition; furthermore, it provides an assessment of various elements that may influence parties' choice of court. The current chapter delivers empirical insights into the civil justice competition in the EU, with the aim of illustrating and enriching the theoretical analysis in Chapter 4. To this end, the work is divided into three parts: the first is an overview of the EU Justice Scoreboard, and its significance for the competition process; the second is an overview of the attitude of some Member States regarding the competition; and the third presents the results of a survey on the choice of court, conducted with professional lawyers working at the largest law firms in the EU. The survey results are examined in light of the results in Chapter 4 and other sections of the chapter in order to map differences between what was analysed theoretically and found empirically.

5.1 The role of the EU in promoting an effective and competitive civil justice

Despite a seemingly *super partes* position in the civil justice competition, the role of the EU as a whole is important. With the entry into force of the Lisbon Treaty, the European Commission was given increased powers to establish a common European Area of Justice, which, together with the role of the EU institutions in it, exercises considerable influence in the civil justice system competition. This section briefly summarises the most relevant steps taken by the European Area of Justice initiative, and provides an overview of the EU Justice Scoreboard. This creates the premises to contextualise the EU's position and its role in the civil justice system competition. Furthermore, the analysis of the Scoreboard aims at determining how the systems of Member States compare to each other based on the reported results.

5.1.1 A European Area of Justice: justice and economic growth

For the EU, the Treaty of Amsterdam created the premises for more cooperation in cross-border civil cases, and was aimed at ensuring the proper functioning of the internal market, by improving cross-border procedures, promoting common rules between Member States, and eliminating legal obstacles to the civil proceedings. The Treaty was the first step towards a European Area of Justice.

With the entry into force of the Lisbon Treaty, the European Commission received more competences in improving and enhancing a genuine European Area of Justice, which means an area of freedom, security, and justice without internal frontiers. In this respect, the European Parliament and the Council have become co-legislators in most areas of judicial cooperation in civil and criminal matters,⁶²⁸ areas in which the EU has been particularly active in preparing and implementing regulations that facilitate cross-border trade.⁶²⁹

Reforms directed at creating a European Area of Justice have been based on four principles: enhancing mutual trust; supporting economic growth (recovery) through qualitatively better judicial systems; making justice simpler for citizens; and protecting fundamental rights.⁶³⁰ However, future improvements to the current situations require more trust between Member States, facilitating the mobility of citizens and companies, and contributing to economic growth through better justice systems. These challenges have prompted the EU to adopt the EU Justice Agenda 2020, which ‘sets out the political priorities’ to be pursued towards a common area of justice.⁶³¹ These political priorities are divided into two groups: Justice for Citizens and Justice for Growth.

Justice for Citizens aims at increasing and safeguarding the rights of citizens in the EU, improving the resolution of cross-border justice problems, and addressing certain issues related to criminal cases. Justice for Growth aims at supporting companies, and at motivating economic growth and stability. The Commission considers that improving access to justice and facilitating the resolution of disputes will contribute to a positive business climate and be a competitive advantage compared to other jurisdictions. Policies aimed at improving access to justice and facilitating the resolution of disputes will continue to be a high priority

⁶²⁸ Kramer (2011) 206; Heusel (2014) 19-25.

⁶²⁹ The EU maintains a list of the directives and regulations in the area of judicial cooperation in civil matters. The list referred to as the European Judicial Atlas can be found at <https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do> accessed on 22 December 2017.

⁶³⁰ Strengthening Trust, Mobility and Growth within the European Union – The EU Justice Agenda for 2020. A New EU Framework to Strengthen the Rule of Law. Available at <http://ec.europa.eu/justice/effective-justice/files/future_justice_brochure_en.pdf> accessed on 22 December 2017.

⁶³¹ European Commission – Memo - The Future EU Justice and Home Affairs Agendas: Questions and Answers. Available at <http://europa.eu/rapid/press-release_MEMO-14-174_en.htm> accessed 22 December 2017.

issue in the 2020 Agenda. It is considered that Justice and citizens' rights should know no borders in the EU.⁶³²

Civil justice and the court system play an important role in economic growth and financial stability.⁶³³ A robust and efficient judicial system assures the enforcement of contracts and the swift handling of litigation cases, and a system with superior qualities is valued highly by businesses, which need to be confident that contracts will be enforced and courts will handle litigations efficiently. Enforcement certainty and litigation efficiency have been taken up as challenges by the Commission, which combines different strategies methods to tackle them.⁶³⁴ Reforming and improving the judicial system is not only a challenge aimed at accommodating businesses but also a necessity for sustainable economic growth.

It is clear at this point that EU institutions consider the justice system to be a means towards economic growth. This strategy is based on the idea that companies, when developing their investment strategies, take into account the quality of justice as well as of other institutions.⁶³⁵ Qualitative institutions guarantee predictability, certainty, fairness, and stability for businesses.⁶³⁶ Moreover, an effective justice system helps companies to protect their entire business cycle from start to finish.⁶³⁷ This should make the EU not only an attractive place to visit but also an attractive place to stay. The European Commission considers that attractiveness can be improved by: 'better enforcement of commercial claims; simplifying the enforcement of judgments in cross-border

⁶³² European Commission – Memo - The Future EU Justice and Home Affairs Agendas: - Questions and Answers. Available at <http://europa.eu/rapid/press-release_MEMO-14-174_en.htm> accessed 22 December 2017.

⁶³³ Strengthening Trust, Mobility and Growth within the European Union - The EU Justice Agenda for 2020. A New EU Framework to Strengthen the Rule of Law. Available at <http://ec.europa.eu/justice/effective-justice/files/future_justice_brochure_en.pdf> accessed on 22 December 2017.

⁶³⁴ More on this can be found at the European Commission - Press release - Towards a true European area of Justice: Strengthening trust, mobility and growth. Available at <http://europa.eu/rapid/press-release_IP-14-233_en.htm> accessed 22 December 2017.

⁶³⁵ European Semester Thematic Fiche - Effective Justice Systems. Available at <http://ec.europa.eu/europe2020/pdf/themes/2015/effective_justice_systems_20151126.pdf> accessed 22 December 2017. Although this fiche does not represent the official view of the European Commission, it is still in line with the ideas expressed in other official documents.

⁶³⁶ As it was concluded in the analysis of competition from bilateral and unilateral choice of court (Chapter 4), the analysis points out that predictability and certainty play an important role in the choice of jurisdiction.

⁶³⁷ EU Justice, Consumers and Gender Equality - Contributing to an attractive environment for businesses and investors, strengthening competitiveness and fostering social inclusion (Factsheet). Available at <http://ec.europa.eu/justice/newsroom/files/csr_factsheet_2015_en.pdf> accessed 22 December 2017.

disputes; introducing rules to help creditors recover cross-border debt; modernising EU insolvency proceedings to help some firms stay in business which would otherwise not survive; encourage EU countries to make their judicial systems ever more efficient and implement necessary judicial reforms as part of their economic recovery programmes'.⁶³⁸ To this end, the Commission encourages Member States to improve the efficiency their court systems. The following part analyses The EU Justice Scoreboard, one of the tools used by the Commission to promote efficiency throughout the Union.

Taking all these documents into consideration, the approval of the Lisbon Treaty gave more powers to the Council to regulate a European Area of Justice, the key priorities being trust, mobility, and growth. Trust implies more trust between Member States in recognising each other's court decisions, while stimulating growth requires efficient and reliable courts. The European Commission tries to spur Member States to develop efficient procedures and reliable institutions. One of the tools employed in this endeavour is the EU Justice Scoreboard. The analysis found little – if any – interest in the civil justice system competition. Nevertheless, the initial claim in this section, that the EU plays an important role in the civil justice system competition, still remains. While it seems true that the EU lacks an active direct role in promoting the competition, an active indirect role should be acknowledged. This role delivers legislation that facilitates competition in the EU, policy papers that encourage the efficiency of the judicial system, and an annual scoreboard that compares Member States' judicial systems with each other.

5.1.2 The EU Justice Scoreboard

5.1.2.1 *A brief description of the Scoreboard*

Since the beginning of 2008, the EU and its Member States have been preoccupied with mitigating the effects of the financial crisis, and with recovering economic productivity. It has been concluded that helping the economic recovery requires legal and institutional reforms. Reforms aimed at an efficient and independent judicial system have been considered as one of the priorities of the European Commission. However, reforms cannot be designed and implemented without a proper analysis of the justice system in each Member State. To this end, the European Commission created the European Judicial Scoreboard in 2013, intending it to be a tool to provide comparative data about the systems of justice in each Member State. It is published every year, and allows Member States to compare their judicial systems, and possibly to draw conclusions and make improvements accordingly. In the words of Viviane Reding, Vice-President of the

⁶³⁸ Civil Justice. Available at <http://ec.europa.eu/justice/civil/index_en.htm> accessed 22 December 2017.

European Commission, ‘The new European Justice Scoreboard will act as an early warning system and will help the EU and the Member States in our efforts to achieve more effective justice at the service of our citizens’.⁶³⁹ In the same press release, Olli Rehn, Vice-President for Economic and Monetary Affairs and the Euro, states: ‘This new Scoreboard will help EU Member States to strengthen their legal systems, boosting their efforts to stimulate investment and job creation’. For the Commission, the Scoreboard is an important comparative instrument that, by confronting the civil justice system of Member States, encourages them to improve their performance. In the foreword of the 2016 Scoreboard, Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, expressed the satisfaction of the Commission to see that ‘...Member States are actively seeking to improve their justice systems with measures ranging from significant reforms of procedural laws, scaling up the use of ICT in the justice system to further promoting the use of Alternative Methods of Dispute Resolution...’.⁶⁴⁰

The scope of the Scoreboard covers litigious civil justice with particular attention paid to litigious civil, commercial, and administrative cases.⁶⁴¹ This focus is intended to include the most sensitive areas of justice where commercial parties are mostly involved. It goes without saying that the underlying aim is to improve the serving of justice for commercial parties. Therefore, the Scoreboard excludes from its scope a considerable part of the justice court system even though criminal justice can have serious consequences for businesses. A weak criminal justice system, which is inefficient, or lenient with criminals and criminal acts (e.g. corruption, bribery, blackmail, extortion, tax evasion, money laundry, fraud), seriously affects the operations of a company. Furthermore, slow or inefficient criminal justice inevitably affects the performance of civil justice by requiring more human and financial capital.⁶⁴² It can be said that the Scoreboard is not an attempt to diagnose the whole justice system of the Member States, but is an endeavour to emphasise the importance of civil justice in economic development.

⁶³⁹ European Commission Press release: EU Justice Scoreboard: European Commission broadens the scope of its analysis of Member States' justice systems. Available at <http://europa.eu/rapid/press-release_IP-13-285_en.htm> accessed on 22 December 2017.

⁶⁴⁰ The 2016 EU Justice Scoreboard. Available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf> accessed 22 December 2017.

⁶⁴¹ The 2013 EU Justice Scoreboard. Available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf> accessed 22 December 2017.

⁶⁴² Judiciary budget is fairly constant each year. This budget is allocated to criminal and civil justice according to their needs, but with criminal justice being preferred because of its role in society and its relationship with the government. Badly managed or poor criminal justice would swallow up more and more resources, to the detriment of civil justice. Genn (2012) 7, 14.

To compile the 2013 Scoreboard, the European Commission with the help of the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) collected data from the World Bank, the World Economic Forum, and the World Justice Project. For the 2014 Scoreboard, the sources of information also include the Eurostat and the European Network of the Judiciary. In addition, the 2014 edition was the first to provide country fiches, which provide detailed information from each Member State, including statistics, a description of the organisation of justice, and reform agenda.⁶⁴³ The methodology with which the information was collected varies according to the sources. The CEPEJ was mostly compiled from information provided by Member State governments.

The Scoreboard identifies three parameters for the justice system: efficiency, quality, and independence. The efficiency parameter is composed of three indicators: length of proceedings, clearance rate, and number of pending cases. The quality parameter is composed of elements such as accessibility of justice for citizens and businesses, adequate material and human resources, putting assessment tools into place, and using quality standards.⁶⁴⁴ However, it can be argued that these indicators are not the only measures, as quality of justice also depends on the quality of the education in a country, the amount of time available to judges to make a decision, the quality of the lawyers and of the legislation, and also of the decision itself. Meanwhile, the Scoreboard indicators seem to focus on the infrastructure of the court system including human and financial resources; therefore, these indicators seem to be more a display of the infrastructure quality of justice. It should be acknowledged that these indicators do play a role in the quality of the justice system, and that those mentioned above are difficult to measure. In light of these difficulties, the Scoreboard is a compromise between providing any measurement and providing the best measurement. The independence parameter is based on the perceived judicial independence and on structural independence. In the end, all these indicators lead to a type of summary or a conclusion.

⁶⁴³ Country fiches can be found within the Study on the functioning of judicial systems in the EU Member States, prepared by the European Commission for the Efficiency of Justice. The 2014 study is available at <http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard_2014_en.pdf>, accessed 22 December 2017. The 2015 study is available at <http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard_2015_en.pdf> accessed 22 December 2017. The 2016 study on all the Member States (1st part) is available at <http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard-indicators_2016_en.pdf> accessed 22 December 2017, the country fiches is available at <http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard-country-fiches_2016_en.pdf> accessed 22 December 2017.

⁶⁴⁴ Since the Scoreboard's inception in 2013, the quality parameter has changed each year, and is now in the form described here.

5.1.2.2 Results and main findings of the Scoreboard

The length of proceedings is of vital importance for business parties. As soon as the conflict is resolved, parties can go about their normal business. Lengthy proceedings are economically costly, and may hinder business development for both parties. However, one party may use lengthy proceedings (also called Torpedo strategies) to hinder the legal actions of the other, or to achieve other strategic gains. Considering the importance of the length of proceedings, the 2016 Scoreboard provides data on the time needed to resolve litigious civil and commercial cases, and to resolve administrative and other cases. Some Member States did not provide data on all of the issues. The 2016 data⁶⁴⁵ show that Denmark, Estonia, and Austria (with Poland, Hungary, Lithuania, Bulgaria, and the Netherlands having similar results) had the fastest times in resolving civil, commercial, administrative, and other cases. Cyprus, Portugal, Greece, and Malta had the worst results.⁶⁴⁶ Comparing data from the four Scoreboards (2013, 2014, 2015, and 2016), the ranking virtually does not change. In general, there was no trend to reduce the time needed to resolve the conflicts; on the contrary, the length of the proceedings increased in more Member States.⁶⁴⁷ Another indicator of the judicial system's efficiency was the ability to resolve at least as many cases as came in, which is referred to as the clearance rate. Most Member States had clearance rates of 100% or higher, while Greece, Ireland, and Cyprus had percentages as low as 80% (Greece).⁶⁴⁸ Low clearance percentages creates backlogs in courts, may influence the speed at which cases are resolved, and can damage the quality of the decision. Possible factors contributing to the low clearance percentages are the legislation's level of efficiency, the number of judges serving in the court, other infrastructural problems, and the judicial culture, and so on. Regardless of the cause, a low clearance rate can be a symptom of chronic problems within a system, and needs to be quickly addressed. Although the clearance rate does not immediately affect businesses, governments cannot afford to neglect this issue, precisely for the reasons mentioned above.

⁶⁴⁵ Belgium, Germany, Ireland, and the UK did not provide data.

⁶⁴⁶ Methods for measuring court proceedings are different in each Member State, as different procedural steps are considered at the beginning or the end of the litigation. However, as reported by the CEPEJ, Member States should also provide information about the method for calculating the start and the end of the proceeding. Generally, the date on which the case was referred to the court is considered as the start. European judicial systems: Efficiency and quality of justice, CEPEJ STUDIES No. 23, page 184 <<http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>> accessed 22 December 2017.

⁶⁴⁷ The data from the 2016 Scoreboard show that the time needed to resolve litigious civil and commercial cases had improved in many Member States. This is in contrast with the main findings, where the time needed to resolve other cases had increased.

⁶⁴⁸ Belgium, Denmark, and the UK did not provide data.

As previously mentioned, the quality of justice parameter in the 2016 Scoreboard is composed of four elements: accessibility of justice for citizens and businesses; adequate material and human resources; putting assessment tools into place; and use of quality standards. Accessibility of justice for citizens and businesses is measured by how much information is given about the judicial system; how much legal aid is provided; the possibility of submitting a claim online; communication between courts and lawyers; communication with the media; the possibility of accessing judgments; and the possibility of accessing alternative dispute resolution methods. Adequate human and material resources are measured by the situation regarding the government's expenditure on law courts, the number of judges, the number of lawyers, and the training possibilities for judges. The existence of assessment tools is measured by the availability of monitoring and evaluating court's activities, electronic case management, and court surveys conducted among court users. Quality standards are measured by the presence of certain standards defined by the European Commission in relation to the justice system. Since publication of the 2013 Scoreboard, Member States have made progress in introducing and implementing online information about the judicial system. More effort is needed, however, to improve the electronic communication capabilities of courts and to maintain the pace of technological development. The financial situation of the judiciary in most Member States remains stable, but only a few have mechanisms for assessing the needs of the system in allocating their budget. Recognising its importance, Member States offer training to judges, but not all offer training sessions aimed at pending legal and practical problems. More effort is required in training judges with regard to communication in order to improve confidence in the judicial system. Most of the Member States have their own standards regarding the judicial system, and these are often very different from those of other Member States. Using results derived these standards makes any comparison difficult. Therefore, the assessment tools that might also be in place in any Member State should be viewed with caution.

Another parameter considered in the Scoreboard is independence, and it consists of three indicators: perceived judicial independence, structural independence, and the work of judicial networks on judicial independence. Perceived independence remains problematic in almost half of the Member States, as respondents consider the 'interference or pressure from economic or other specific interest' and 'interference or pressure from government and politicians' to be problematic. Overall, and in comparison to citizens, companies perceive courts to be more independent. The overview regarding structural independence indicates that Member States have established institutions and procedures to safeguard judges from arbitrary transfers or dismissals. Court finances are still dependent on the executive and legislative branch. Independence is also affected by the fact that in

most cases the court budget is prepared by the government and approved by parliament, while the judiciary is side-lined.

Overall, the Scoreboard provides an overview of the justice situation in the EU. Despite its name, however, the Scoreboard does not offer any score or ranking of the Member States. Thus, it is in the hands of the Member States or interested parties to draw conclusions regarding the figures and the statistics. It must be remembered that creating a ranking announcing a winner or a loser was never the Scoreboard's intention, as that would have resulted in major political embarrassment as well as in denial by Member States and in counterproductive rifts. In a broader perspective, however, the Scoreboard fits perfectly within the EU justice policies, which aim at a healthy judiciary with more efficient, qualitative, and independent courts. A healthy judiciary is after all part of the bedrock upon which a strong economy is based.

Moreover, the Scoreboard joins a host of other empirical attempts to measure the health of the judicial system in the EU. Among others, the Scoreboard is complementary to the CEPEJ (European Commission for the Efficiency of Justice) Study on the functioning of judicial systems in EU Member States. Another source of data is provided by the Eurobarometer,⁶⁴⁹ which measures public opinion in EU Member States in different fields. Similar studies on the judicial system are carried out by the World Bank⁶⁵⁰ and the World Economic Forum,⁶⁵¹ and they point to the attention being paid to the health of the justice

⁶⁴⁹ Since 2010, there have been several Eurobarometers dedicated to justice in the EU. In 2010, Special Eurobarometer 351: Civil Justice published data on a broad range of topics related to cross-border EU civil justice. For more, see <http://data.europa.eu/euodp/en/data/dataset/S895_73_5_EBS351> accessed 22 December 2017. In 2013/2014, Flash Eurobarometer 385: Justice in the EU published data on the perception of justice by citizens of Member States both with regard to their countries and to the EU. For more, see <http://data.europa.eu/euodp/en/data/dataset/S1104_385> accessed 22 December 2017. Two publications in 2016 were dedicated to the perceived independence of national justice systems in the EU. The first was Flash Eurobarometer 435: Perceived independence of the national justice systems in the EU among the general public. For more, see <http://data.europa.eu/euodp/en/data/dataset/S2116_435_ENG> accessed 22 December 2017. The second was Flash Eurobarometer 436: Perceived independence of the national justice systems in the EU among companies. For more, see <http://data.europa.eu/euodp/en/data/dataset/S2132_436_ENG> accessed 31 January 2017.

⁶⁵⁰ Every year, the World Bank issues a Doing Business Report that contains data on business-related court issues. For the latest issue of the Report, see <<http://www.doingbusiness.org/reports/global-reports/doing-business-2017>> accessed 31 January 2017.

⁶⁵¹ The World Economic Forum prepares reports on Global Competitiveness. This Report contains data on perceptions regarding independence of the judiciary, from a global perspective. For 2015-2016, see <http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf> accessed 31 January 2017.

systems by major economic organisations. However, a ranking – as is done for many economic indexes – of the EU Member States has not yet been conducted.

5.1.2.3 Calculating a score from the Scoreboard

Methodology

As mentioned above, the Scoreboard does not provide any ranking or final mark for the jurisdictions assessed. Because grading judicial systems can be politically thorny and sensitive, any classification would trigger harsh reactions from almost all the Member States. Furthermore, the aim of the Commission is to foster development and to offer comparative tools rather than to declare winners. Nevertheless, having a scoreboard without final scores seems counterintuitive, and is a source of temptation to compile them. What in fact might be the added value of scoring and ranking the jurisdictions?

Scoreboard data can produce a ranking that can be used to compare the performance of Member States' judicial systems. However, these data are derived from different sources and categorised into subject matters or indicators; hence, it would be more beneficial to calculate a score for each indicator and in the end a final score based on each of the Scoreboard's indicators. This approach would emphasise the strong and weak points for each Member State, and would mitigate some of the problems that are addressed below. Moreover, the Scoreboard dates from 2013, this would allow for a longitudinal study, which would contribute to a better understanding of the competitive behaviour of Member States, and of whether reforms enacted by Member states result in improvement.⁶⁵²

Even though the Scoreboard indicators are not meant to function as instruments to support the civil justice competition, a scored ranking can be useful to competing jurisdictions. A positive final ranking would be a good advertisement for the jurisdiction that scored best, and it could use this ranking to promote its court system as well as to evaluate the success of possible reforms. Despite the fact that the ranking of Member States might lead to tension with regard to the European Commission, it could bring certain benefits as well. Faced with the eventual embarrassment of a low Scoreboard ranking, as well as the potential negative economic consequences, Member States might be more open to considering steps to reform their systems. Focusing on indicator rankings can better emphasise a system's qualities and problems. However, Member States can use 'the good scores' in one indicator to counter negative results from other indicators. From the European Commission's perspective, ranking jurisdictions

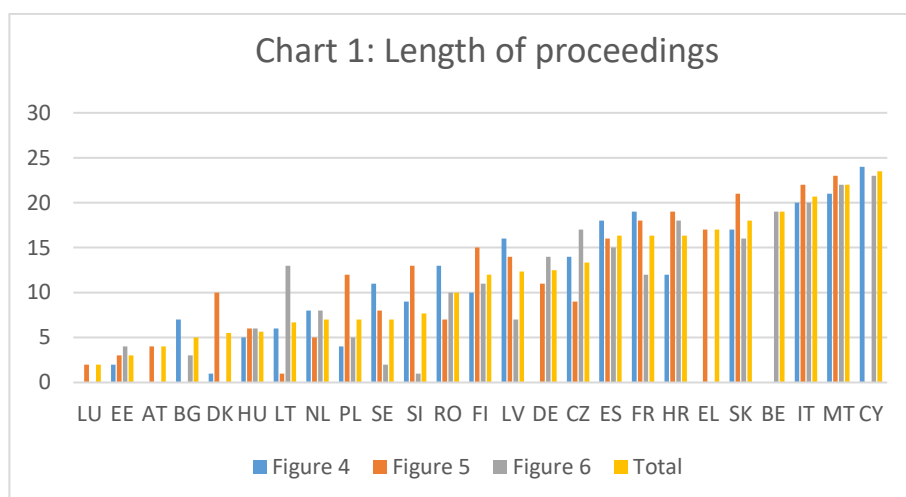
⁶⁵² On general benefits of longitudinal studies, see Lynn (2009) 4-10; Elliott, Holland, and Thomson (2008) 237-239, 240-242.

for every indicator can facilitate reporting on and providing recommendations to Member States. Ranking would make Member States even more interested in providing information, because failure to appear in the Scoreboard ranking could be seen as equal to a bad placement.

Creating a ranking, however, faces certain problems, one of which is that not every Member State provides data. Since data are not collected specifically for the Scoreboard, it is not sure whether the methodology for their collection is the same for all Member States. Differences in methodology could affect the quality of the data and the ranking of jurisdictions. Another difficulty has to do with the methodology of scoring jurisdictions for their achievements. While it is easy to score countries for their litigation speed, it is difficult to give scores to legal or administrative reforms. Furthermore, not all Member States provide data on all the elements, which influences the magnitude of the final score. For example, a Member State that scores 9, but that supplied data for all elements of the Scoreboard, can still be behind a Member State that scores 10, but provides data for only half of the elements. Because of this, any ranking derived from the Scoreboard would need to be viewed with caution and accompanied by the related caveat.

Considering the potential usefulness of gauging a ranking from the Scoreboard, this section proposes a method for calculating the score and compiling a ranking. The Scoreboard is divided into three Parameters, with each divided into Indicators, and each indicator divided into Figures. Figures are the basic units of the Scoreboard, and provide data on a specific element of the judicial system for all the Member States. Figure 4, for example, provides information regarding 'Time needed to resolve civil, commercial, administrative, and other cases'. The Scoreboard ranks the Member States for every figure, but does not provide a score. To create the ranking, for each figure, the best performing Member States was scored with one point, the second best with two points, and the third best with three and so on, until the last one, which is scored with twenty-eight. This means that the lower the score, the better. The score for each indicator is the average score of its combined figures, as is the score for each parameter. The final Scoreboard score is the average score of the three parameters. As part of the methodology, it should be borne in mind that the calculation is performed to help in assessing the quality of the court system in relation to the competition of the civil justice system. Some of the figures were not considered to be important for the competition, and excluded them from the final calculation. Excluded figures are mentioned in the analysis below. A persistent problem with the Scoreboard is that not all the figures have complete data; some are missing partial or complete data from particular Member States. Those that miss data are not scored. For some of the figures, more than one Member State occupies the same position. In this

case, all Member States occupying the same position are scored the same. The analysis below is illustrated by way of charts for every indicator and parameter. A final chart for the Scoreboard is also provided, and the Annexes section contains detailed table scores for each figure.

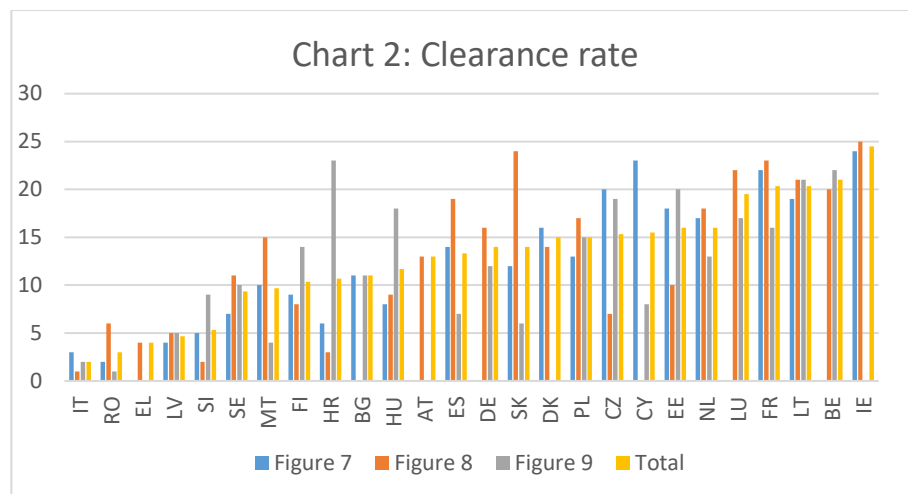


Efficiency of the justice sector

Based on the methodology described above, calculated was the score for each figure, each indicator, and each parameter, and arrived at the final score. The first Scoreboard indicator is ‘Length of proceedings’ (Chart 1), which comprises Figures 4 to 6.⁶⁵³ The United Kingdom, Ireland, and Portugal did not provide any data for these figures; Luxembourg, Austria, and Greece did not provide data for two of the figures; and Bulgaria, Germany, Denmark, and Cyprus did not provide data for one of the figures. Taking into account the Member States with data for all the figures in the section ‘Length of proceedings’, Estonia, Hungary, and Lithuania are in first three spots. Luxembourg, Austria, and Bulgaria score high as well, but did not supply data for all the figures. Slovakia, Italy, and Malta occupy the last three spots among the Member States that provided data for the three figures. Cyprus and Belgium also have comparable scores but did not supply data for all the figures. The ranking indicates that small jurisdictions have faster

⁶⁵³ Figs. 4-6: Fig. 4 ‘Time needed to resolve civil, commercial, administrative and other cases’; Fig. 5 ‘Time needed to resolve litigious civil and commercial cases’; Fig. 6 ‘Time needed to resolve administrative cases’.

proceedings,⁶⁵⁴ while the bottom is occupied by Malta, Slovakia, and Italy (this last infamous for the Italian Torpedo).



‘Clearance rate’ is the second indicator in the first index, and measures the ratio of the number of resolved cases over the number of incoming cases. Countries that resolve more cases than those registered annually in their courts have high clearance rates. Clearance rate may indicate the ability of courts to resolve in one year at least as many cases as are registered. However, this does not mean that these courts are fast. A case might still take a lot of time to be resolved in these jurisdictions. Clearance rate should be considered as an indication that the courts do not overburden themselves by accepting more cases than they are able to resolve. In the 2016 Scoreboard, clearance rate is measured by Figs. 7, 8, and 9.⁶⁵⁵

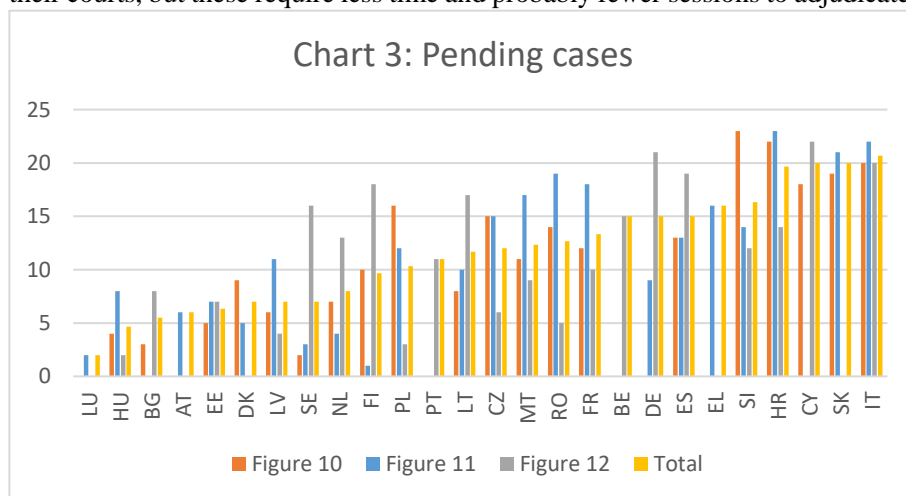
From the calculation (Chart 2: Clearance rate), it is seen that Italy, Romania, and Latvia are the highest scoring Member States, while France, Lithuania, and

⁶⁵⁴ The reasons for this can vary. Small Baltic countries have a small population and have experienced a quick development. This might have improved their general efficiency with a positive after-effect for the courts. Moreover, it can be argued that the small size of the country implies fewer cases in number and fewer complications in their claims. This means that courts can be faster in proceeding and in deciding. However, this does not explain why Member States with comparable sizes, like Malta, Slovakia, Lithuania, or Slovenia, are so far behind Baltic countries.

It should also be remembered that Member States have different methods of calculating the length of the proceedings.

⁶⁵⁵ Measurements: Fig. 7 ‘Rate of resolving civil, commercial, administrative and other cases’; Fig. 8 ‘Rate of resolving litigious civil and commercial cases’; and Fig. 9 ‘Rate of resolving administrative cases’.

Estonia are at the bottom of the table.⁶⁵⁶ Comparing Chart 1 to Chart 2, it seems that Member States that are in the first position in one of the charts are in the last position in the other. This means that there is a group of Member States that have high clearance rates and low speeds and a group with low clearance rates and high speeds. The first group is characterised by a decreasing number of cases registered in courts, but because of the slow proceedings more time is dedicated to each case, and probably more court hearings are organised. The opposite can be said of Member States in the second group. They see an increasing number of cases in their courts, but these require less time and probably fewer sessions to adjudicate.



‘Pending cases’ is the third indicator in this parameter (Chart 3: Pending cases). Pending cases measures the cases still remaining after a certain period of time. Scores for this section can be influenced by the methodology used by each individual reporting Member State. The pending cases parameter is important, as it indicates the system’s efficiency and its ability to proceed within the timeframe set for a specific process. This indicator contains data from Fig. 10 to 12 on the Scoreboard.⁶⁵⁷ If only the Member States with data for all the figures are considered, Hungary, Estonia, and Sweden are the best jurisdictions in the list, while Croatia, Cyprus, and Italy are the worst. Obviously, the ranking of

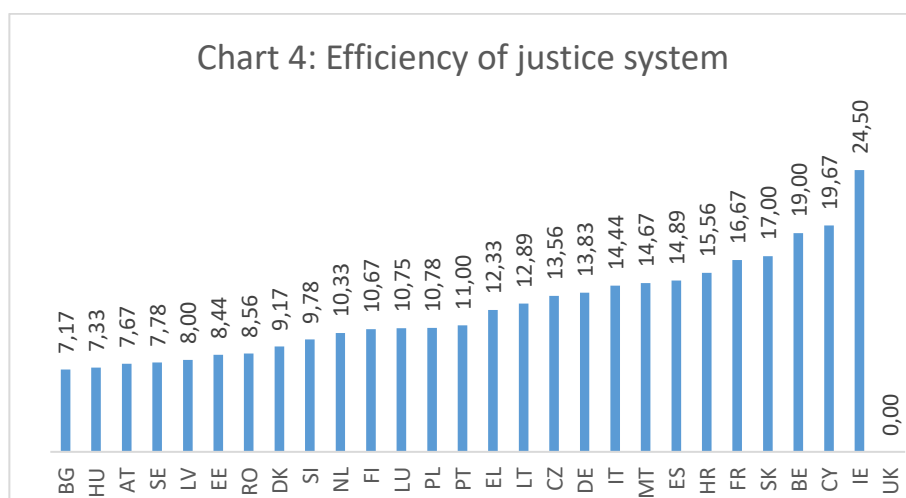
⁶⁵⁶ Greece and Austria did not present data for two of the figures, while Bulgaria, Germany, Denmark, Cyprus, Belgium, and Ireland did not present data for one figure. The UK and Portugal did not present data for any of the figures.

⁶⁵⁷ Fig. 10 ‘Number of civil, commercial, administrative and other pending cases’, Fig. 11 ‘Number of litigious civil and commercial pending cases’, Fig. 12 ‘Number of administrative pending cases’. The United Kingdom and Ireland did not provide data for any of these figures. Luxembourg, Austria, Portugal, Belgium, and Greece did not submit data for two of the figures. Bulgaria, Denmark, Germany and Slovakia did not submit data for one of the figures.

jurisdictions according to their proceeding speed mirrors the ranking of jurisdictions in the pending cases section. It goes without saying that a consequence of slow proceedings is an increase in the number of pending cases. Pending cases can be a good indicator of the system's quality. Because each jurisdiction decides for itself the judicial timeframes, non-adherence can be interpreted as a lack of efficiency. Obviously, lack of efficiency is a characteristic to avoid when choosing a court, and is an unfavourable factor for any competing jurisdiction.

The fourth indicator in the efficiency of the judicial system index is 'Efficiency in specific cases', and it includes Figures 13 to 17.⁶⁵⁸ The inclusion of these figures in the Scoreboard is justified by their importance for commercial parties and investment stimulation. For this indicator, only five Member States provided data for all the figures. The problem here is that for some jurisdictions either the scenario presented for the Scoreboard does not apply in their legal order or they do not have data or cases. With this in mind, it becomes difficult to claim that the ranking for this indicator represents the efficiency of the system or the efficiency of the system in commercial situations. Owing to these problems, it is better to omit the fourth indicator from the final calculation for this index.

⁶⁵⁸ Fig. 13 'Insolvency: Time needed to resolve insolvency'; Fig. 14 'Competition: Average length of judicial review cases against decisions of national competition authorities applying Articles 101 and 102 TFEU'; Fig. 15 'Electronic communications: Average length of judicial review cases against decisions of national regulatory authorities applying EU law on electronic communications'; Fig. 16 'Community trademark: Average length of Community trademark infringement cases'; Figure 'Consumer protection: Average length of judicial review cases against decisions of consumer protection authorities applying EU law'.



Given that the fourth indicator cannot be used to calculate the score for the Efficiency of Justice System parameter, the final score for this parameter derives from the first three indicators (Chart 4: Efficiency of justice system). It should be remembered that some Member States do not have data for all the figures. For example the United Kingdom, Portugal, and Ireland did not present data for two indicators, while Austria, Luxembourg, Greece, and Belgium are missing data for more than half of their figures. This creates differences in the quality of the final score, and makes comparison difficult. It means that the scores need to be considered with caution. Taking into account only the Member States with data for all the figures, the best would be Hungary, Sweden, and Latvia, while Spain, Croatia, and France are in last place. The indicators used for this parameter serve different purposes. The speed of the litigation shows how cases are handled by fast courts, and is a very important indicator for parties trying to choose a court. Clearance rate is an indicator that shows the extent to which courts can absorb new cases. However, it says nothing about speed. It is simply an indication that the court system, with its current infrastructure and resources, is able to absorb the current level of litigation. A clearance rate of 100% shows that courts work with a constant workload (assuming that the speed of litigation is the same); a rate of more than 100% shows that courts have a tendency to reduce their workload; and a rate of less than 100% shows that courts have a tendency to increase their workload. In my opinion, both sides of the 100% mark are problematic for the government, and the best position would be the middle. However, this creates some problems in organising the results. Member States that perform better are to be found in the middle of the table in the Clearance Rate indicator, which affects their final score. Member States that have slow proceedings, and that also have many pending cases, receive a small boost from the results of the Clearance Rate. This explains why some Member States with fast proceedings and few pending

cases are in the first half of Chart 4 (Estonia, Denmark, the Netherlands), while some other slow proceeding Member States, with more pending cases, are in second half of Chart 4 (Greece, Italy, Malta). Nevertheless, two conclusions can be drawn from this. First, jurisdictions that perform constantly well are still at the top of the Efficiency of Justice System table, while jurisdictions that perform constantly badly are at the bottom. Second, in view of the civil justice competition, parties seems to be more receptive to the length of proceedings compared to the clearance rate and pending cases.⁶⁵⁹ This means that while the EU (and maybe Member States) evaluate the efficiency of a more complicated system, their potential clients use more simplified systems or other criteria.

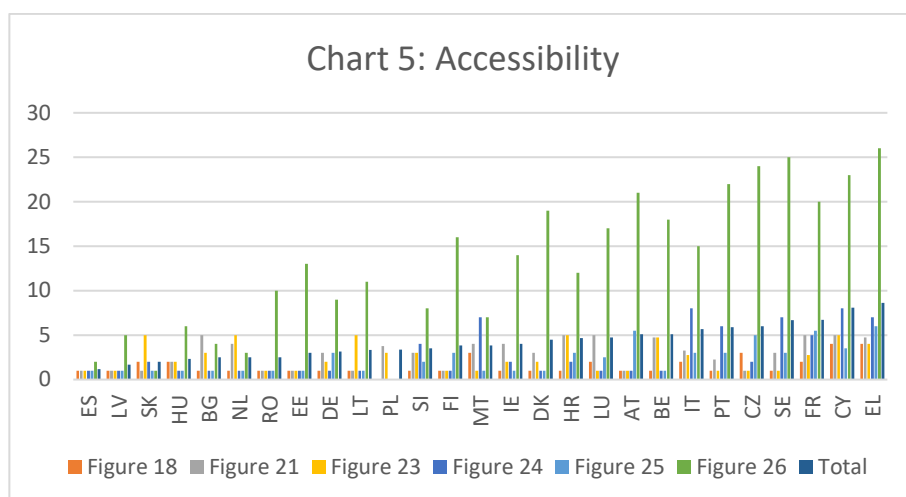
Quality of the justice system

The second parameter of the Scoreboard is the Quality of Justice Systems, which includes Figures 18 to 43. This parameter contains four indicators, the first being Accessibility, which comprises Figures 18 to 27.⁶⁶⁰ These figures measure, among others, the availability of information about the judicial system for the general public, a court's electronic communication, availability of judgments, and communication between courts and the media. The Accessibility indicator measures some very important elements of the civil justice system competition, including transparency, accessibility and availability of information, and legal certainty. These elements are significant influential factors with regard to parties' choice of court decisions. They have an impact on costs, legal certainty, and the general evaluation of the court. Nevertheless, not all the figures present in this section are important: for example, 'Annual public budget allocated to legal aid', 'Income threshold for legal aid in a specific consumer case', and 'Benchmarking of small claims procedures online', and so forth. While the budget for legal aid or the threshold for receiving legal aid are important, the demand side of the competition is not interested in these elements. As was concluded in Section 4.3.1 'Characteristics of the demand', actors on the demand side are mobile and wealthy enough to support their mobility. Furthermore, Member States as suppliers are more interested in having wealthy litigants than in financing the litigation of small, financially impaired parties. Following this reasoning, it is appropriate to omit some of the figures from the score calculation for this parameter. The result will be better tailored to the performance analysis of Member States in view of

⁶⁵⁹ See Section 5.3.

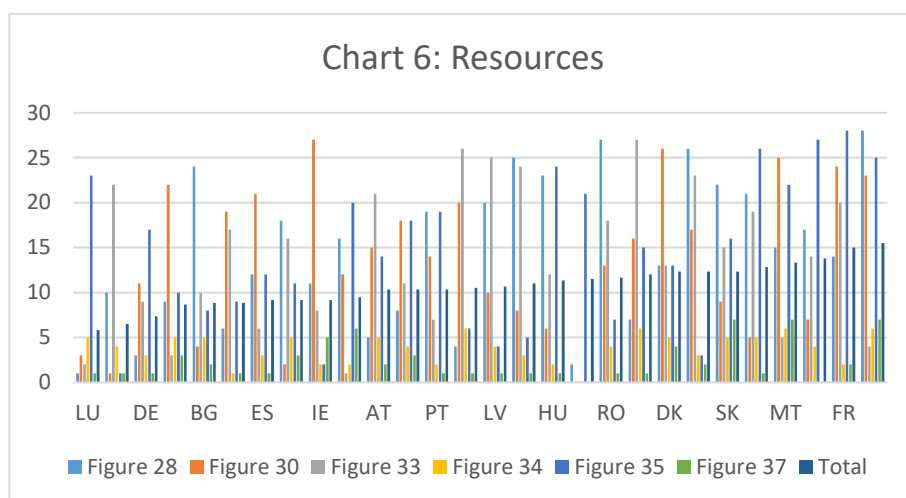
⁶⁶⁰ Figs. 18-27: "Availability of online information about the judicial system for the general public", 'Annual public budget allocated to legal aid', 'Income threshold for legal aid in a specific consumer case', 'Electronic submission of claims', 'Benchmarking of small claims procedures online', 'Electronic communication', 'Relations between courts and the press/media', 'Access to published judgments online', 'Arrangements for online publication of judgments in all instances', and 'Promotion of and incentives for using alternative dispute resolution methods'.

the civil justice system competition. However, despite the fact that some figures are omitted from the score calculation, their importance for the general well-being of the justice system should not be underestimated. In general, a good score in any figure is an indication of quality and should not be ignored.



Considering the discussion above, the score for the Accessibility of court indicator does not take into account Figs. 19, 20, 22, and 27.⁶⁶¹ The United Kingdom did not present data for any of the figures, while Poland did not present data for two of the figures. From the calculations (Chart 5: Accessibility), Spain, Latvia, and Slovakia top the ranking, while France, Cyprus, and Greece occupy the lowest positions. In general, Eastern European Member States are better placed compared to their counterparts in the west. The score might indicate the eagerness of these Member States to embrace modern court access methods in order to combat their chronic court problems.

⁶⁶¹ The figures used in compiling the ranking are ‘Availability of online information about the judicial system for the general public’, ‘Electronic submission of claims’, ‘Electronic communication’, ‘Relations between courts and the press/media’, ‘Access to published judgments online’, and ‘Arrangements for online publication of judgments in all instances’.



The second indicator of the Quality of Justice parameter is Resources (Chart 6: Resources), which include Figs. 29-37. These figures take into account the situation involving financial and human resources in all Member States. Resources are an important element of the civil justice competition, as comparatively high resources in a jurisdiction dedicated to the court system can indicate competition or a willingness to compete. Based on the conclusions in Section 4.3.1 ‘Characteristics of the demand’, court resources were not considered to be influencing factors for the demand side. However, resources can play an important psychological role in attracting litigants, similar to the way clients are attracted by lawyers.⁶⁶² This means that a well-resourced court can be attractive to litigants despite other lacunae or other courts being more efficient or better options in general. That said, it should be remembered that extensive resources dedicated to courts do not immediately indicate a better court, but they can indicate a more competitive court, a court that is more willing to compete, or a potentially competitive court.

Figures 29, 31, 32, and 36 are not included in the score calculation for this indicator (Chart 6: Resources).⁶⁶³ The United Kingdom provided data for only two of the figures, while Poland did not provide data for any of them. The results

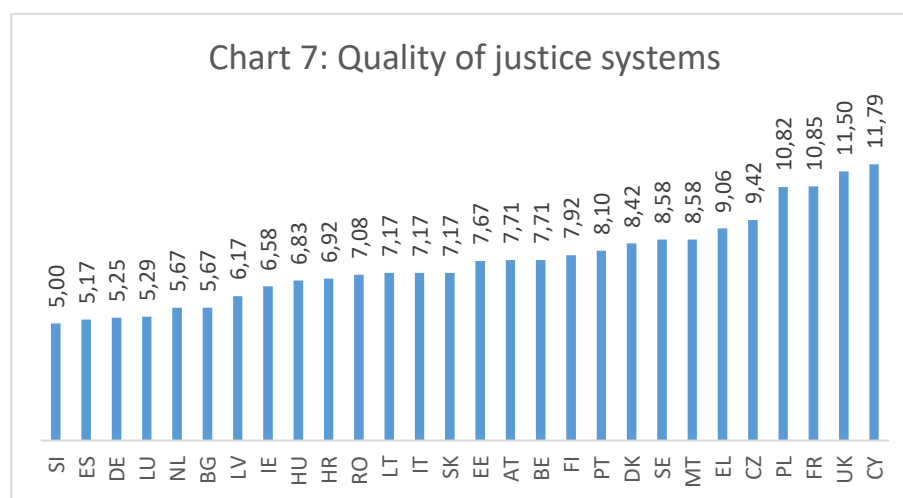
⁶⁶² This was mentioned in Sections 4.3.2, 4.3.3, and 4.3.3. It was also developed by Hadfield (2000) 968-972.

⁶⁶³ Fig. 29 ‘General government expenditure on law courts’; Fig. 31 ‘Proportion of female professional judges at first and second instance and Supreme Courts’; Fig. 32 ‘Variation in proportion of female professional judges at both first and second instance from 2010 to 2014 as well as at Supreme Courts from 2010 to 2015’; Fig. 36 ‘Percentage of continuous judicial training activities on various types of judicial skills’. Without understating their importance, these figures can be considered not relevant for the civil justice system competition, and are omitted from the score calculation.

show that Luxembourg, Slovenia, and Germany top the ranking, while Poland, France, and Cyprus are at the bottom. The table's score is influenced mostly by the human resources figures of the Member States. The ranking is also influenced by the availability of training for judges, which accounts for three of six figures in this section. However, Member States have different approaches when it comes to training judges. Considering that a competitive jurisdiction would be interested in maintaining a well-trained and up-to-date judiciary, the results of this section can be a good indication of their interest in competing and maintaining a competitive judiciary. The last two indicators of this parameter are 'Assessment tools' and 'Quality Standards'. The first contains figures aimed at measuring the ability of a Member State to assess its own judicial quality and efficiency. This section is not considered in the score of this index, because it provides data that are not relevant for the civil justice system competition. Moreover, the existence of an assessment tool does not say anything about the quality of the tool or the quality of the tool's product. This problem could have been resolved by the 'Quality Standards' section, which contains figures on 'Defined standards on aspects related to the justice system' and 'Specific standards in selected aspects related to the justice system'. However, these figures only identify and list standards related to the justice system, and report on their availability in all the Member States. The Scoreboard does not discuss the quality of these standards.

The final score relating to the Quality of justice system parameter is based on the results of the Accessibility and Resources indicators (Chart 7: Quality of justice systems). The best scoring Member States are Slovenia, Spain, Germany, Luxembourg, and the Netherlands, while Greece, the Czech Republic, France, and Cyprus⁶⁶⁴ have the worst score. It should be reminded that in essence these results show the extent to which Member States have advanced in electronic communication and to which they invest in training judges. As previously mentioned, Eastern European Member States seem to have advanced in electronic communication, while at the same time they seem eager to train their judges (Chart 6). This can explain why eight Eastern European Member States are in the first half of the table. Even if the figures and the calculation do not show the entire picture as regards court accessibility or the overall quality of judges, the dedication of some Member States to improving in both these sectors should serve as an example with respect to competing in the civil justice system competition.

⁶⁶⁴ The UK was not mentioned because of an insufficiency of data.

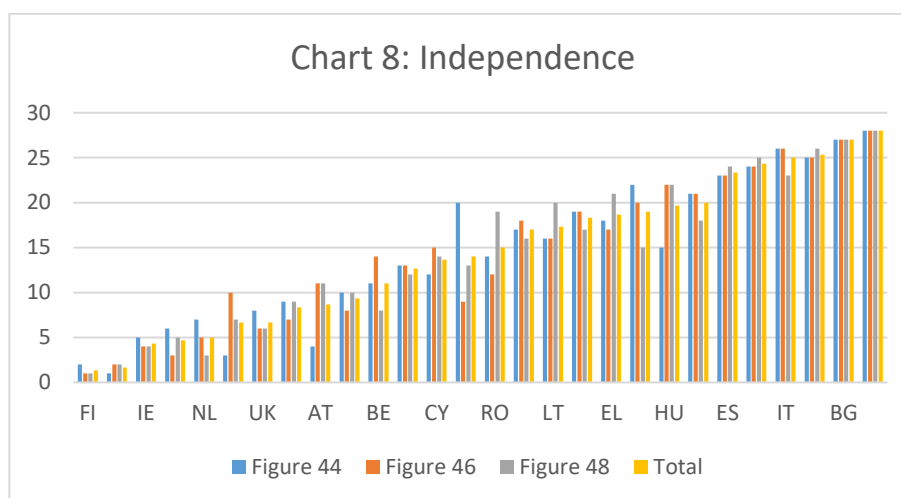


Independence

The final parameter of the Scoreboard is ‘Independence’, which consists of three indicators and comprises Figs. 44-57. The first indicator, ‘Perceived judicial independence’, includes Figs. 44-48. The second indicator, ‘Structural independence’, includes Figs 49-55. The third indicator, ‘Work of the judicial networks on judicial independence’, includes Figs. 56-57. The first indicator contains data on the perception of judicial independence among the general public and companies. Figs. 45 and 47 indicate the main reasons for the perceived lack of independence among the general public and companies, respectively. These figures are not included in the calculation of the score for this parameter. The second indicator is an overview of the judiciary organisation, including the organisation of the judicial councils and safeguards to judges’ positions, and so on. This indicator does not rank the countries, and apart from an overview concerning how the judicial power is organised, it does not make any qualitative analysis. Therefore, the figures for this section have been omitted from the scores of this parameter. The third and final indicator presents a comparative overview of certain legal safeguards aimed at protecting judicial independence, but does not provide an evaluation of their effectiveness.⁶⁶⁵ This section does not provide data from all the Member States, nor does it provide an analysis that can allow them to be ranked. As a consequence, the results of this section have not been considered in calculating the score for the Independence index.

Considering the practical obstacles mentioned above, the score for the Independence parameter is calculated based on Figs. 44, 46, and 48. The final

⁶⁶⁵ This is how this section is presented in the 2016 Scoreboard.

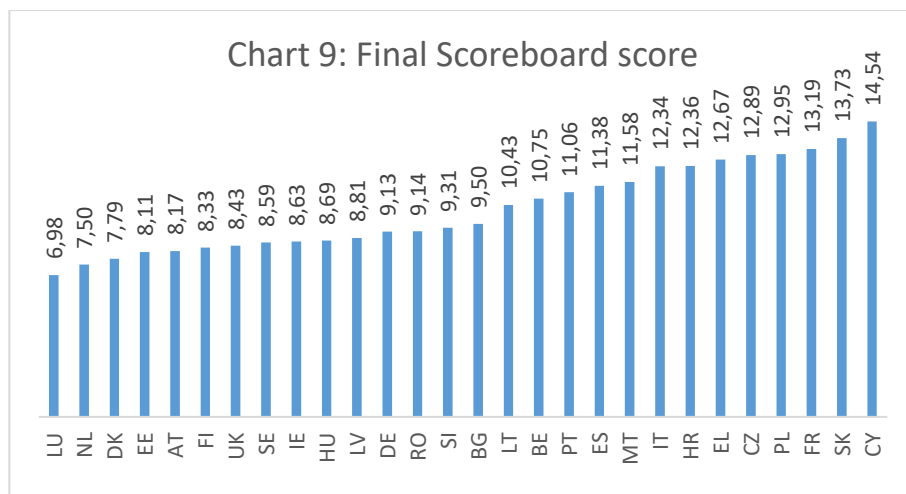


score reflects the perceived independence of judges and courts among the general public and businesses (Chart 8: Independence). Results show that courts and judges in Finland, Denmark, Ireland, Luxembourg, and the Netherlands are perceived as being the most independent, while courts in Slovenia, Italy, Croatia, Bulgaria, and Slovakia are perceived as being the least independent. The results should be viewed with caution, however, for reasons related to the sensitivity and perception of independence by the respondents. The sensitivity of legal and natural persons towards independence is different among Member States for historical and cultural reasons, while the notion of independence is relative and sensitive with regard to the cultural background of the respondents. Nevertheless, the results of this index do not come as a surprise. Countries that ranked highest have established traditions in democracy and in lack of corruption,⁶⁶⁶ which helps them maintain a low perception of corruption.

From the perspective of the civil justice system competition, the independence of the court and judges is a very important criterion. Independence increases predictability, quality, and assurance that the decisions will be based on facts rather than on extrajudicial factors. Therefore, parties would be interested in choosing a court with high levels of independence. On the basis of the Oxford

⁶⁶⁶ Data from the Rule of Law Index of the World Justice Project and Transparency International provide more details on the perception of justice and corruption, respectively. In both of them, Finland, Denmark, Luxembourg, Sweden, the Netherlands, and Germany are in the top ten. See the Rule of Law Index <<http://data.worldjusticeproject.org/#table>> accessed 22 December 2017, Transparency International <<http://www.transparency.org/cpi2015#results-table>> accessed 22 December 2017.

survey,⁶⁶⁷ but also on the results of my own survey,⁶⁶⁸ independence of the court is seen as one of the most influential factors in choosing a court.



A final score from the Scoreboard, and some conclusions

Now that the score for all the parameters has been discussed, the final ranking can be calculated (Chart 9: Final Scoreboard score). The final score for each Member State is the average of their score for each figure considered above. Before continuing with the score, however, a caveat should be noted. As mentioned, some figures account for the personal perceptions of respondents, which means that they are based on values and feelings that can vary from one Member State to another. The reasons are to be found in the different psychological perceptions, and in different historical and legal developments. However, the Scoreboard data are considered to be qualitatively equal and therefore comparable. Moreover, only four Member States (Spain, Hungary, Italy, and Slovenia) provided data for all the figures considered here. Therefore, comparing Member States' scores with each other should be done with caution, and always by considering the limited amount of data that was presented. The question at this point is how to compare data that have been derived from different sources. The approach adopted here is pragmatic. First, the final ranking of Chart 9 does not claim to give a score to the justice systems of Member States. Second, the aim of the scores in Chart 9 is to provide an average score not only of all the figures in the Scoreboard but also for

⁶⁶⁷ The results of the survey cannot be found on the website of the Oxford Institute of European and Comparative Law. A copy of the final results can be accessed at <http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf> accessed 22 December 2017.

⁶⁶⁸ See Section 5.3.

every parameter and indicator. Third, the scores in Chart 9 can serve only to provide a diagnosis of the apparent health of the justice system. With these warnings in mind, we can proceed to the following analysis.

The analysis of the final Scoreboard results, as illustrated in Chart 9, has the following steps. First, it lists the five top-scoring Member States, and provides an analysis of their best-scoring figure(s) in order to understand what places them in the top five. Second, it continues with the five lowest-scoring Member States in order to determine reasons for the lows. Third, the analysis expands on two Member States: The United Kingdom and Germany. The UK, Germany, the Netherlands, and France have been mentioned in the previous chapters as being actively interested in attracting litigants to their jurisdictions. Therefore, an analysis of their scores would be of interest to evaluate their ‘sincerity’ in advertising themselves, as well as their strong and weak points. Since the Netherlands and France will be covered by the first and second step of the analysis, the third step covers only the UK and Germany. Furthermore, the analysis tries to identify the most successful aspects of Member States at the top of the list.

The best scoring Member States are Luxembourg, the Netherlands, Denmark, Estonia, and Austria. **Luxembourg** provided data for all but seven figures, and is in the top five in the indicators Length of proceedings (Chart 1), Pending cases (Chart 3), and Resources (Chart 6). It is also in the top five in the Quality of justice parameter (Chart 7) and the Independence parameter (Chart 8). According to the scores, Luxembourg would appear to have some of the best trained judges among the twenty-eight Member States, as well as an implied economic dedication to the justice system. Confidence on the part of the public and businesses is also high. A high score in both of these parameters as well as a first place overall makes Luxembourg an ideal candidate in the civil justice system competition. Because of its independence and quality, litigants can rely on a predictable, transparent, and professional court.

The Netherlands is one of the Member States mentioned in previous chapters as being interested in the competition; hence, finding the Netherlands at the top of this Scoreboard ranking is not a surprise. The Netherlands provided data for all but three of the figures, and it is among the top five in the Accessibility indicator (Chart 5), in the Quality of justice systems parameter (Chart 7), and in the Independence parameter (Chart 8). And although the Netherlands does not appear in the top five as often as Luxembourg, it is consistently ranked in top positions. It goes without saying that an independent and qualitative judiciary together with a court’s accessibility are traits eagerly sought by the demand side. Therefore, the

Netherlands, in addition to indicating its interest in the civil justice system competition, is well equipped to compete within the EU.

Denmark is in third position, and provided data for all but five figures. The Danish legal system is among the top five in the Length of proceedings indicator (Chart 1) and in the Independence parameter (Chart 8). Denmark is another example of a jurisdiction with high ranking courts but that does not seem interested in the civil justice system competition.

Estonia is in fourth position, and provided data for all but two figures. Estonian courts are in the top five in the Length of proceeding indicator (Chart 1) and the Pending cases indicator (Chart 3). Estonia would have topped the Efficiency parameter had it not been for the Clearance rate section. As was explained, it appears that fast courts have a low clearance rate, which would explain why Estonia is among the last Member State in this indicator (Chart 2). Estonia is also in the top half of the ranking in almost all of the indicators, which contributes to its final score. Despite being in the eastern part of the EU, and away from the spotlight of the large western economies, based on the score, Estonian courts deserve more attention – not only from litigants in search of an efficient court but also from other Member States in search of an example.

The top fifth position is held by **Austria**, which provided data for all but eight figures. Austrian courts are among the top five in the Length of proceedings indicator (Chart 1), the Pending cases indicator (Chart 3), and the Efficiency of justice system parameter (Chart 4). According to the data, Austrian courts are fast and efficient in adjudicating and handling cases. From the perspective of the civil justice system competition, however, Austria does not seem to be active in promoting its jurisdiction. The ranking in the Scoreboard figures shows that Austria has a great deal to offer to international litigants.

The second step in the analysis concerns the bottom five Scoreboard rankings. These positions are occupied by the Czech Republic, Poland, France, Slovakia, and Cyprus. **The Czech Republic** is fifth from the bottom, and provided data for all but one figure. In the Accessibility indicator, the Resources indicator, and the Quality of justice systems parameter, the Czech Republic is in the bottom five. In none of the indicators is the Czech Republic in the top five. For Czech courts, the problems seem to be the lack of innovation and the lack of resources dedicated to courts. However, improvements are needed with regard to other indicators as well.

Poland is the second Member State ranking in the bottom five, and it provided data for all but six figures. The Polish judicial system is in the bottom five in the Resources indicator (Chart 6) and the Quality of justice system parameter (Chart 7). Problems related to resources and accessibility, as in the Czech case, seem to

persist. However, for both the Czech Republic and Poland, the problems are not restricted to the Quality of justice system parameters; they persist through all the Scoreboard's figures, which means that the whole judicial system needs to be improved.

France is the third Member State ranking in the bottom five, and provided data for all but one figure. The French court system is in the bottom five in the Clearance rate indicator (Chart 2), the Accessibility indicator (Chart 5), the Resources indicator (Chart 6), the Efficiency of justice system parameter (Chart 4), and the Quality of Justice parameter (Chart 7). The results are quite discouraging, considering that France promotes itself as an attractive venue for cross-border litigation. If the ranking represents the reality, litigants might be reluctant to choose France. It appears that France needs urgent and significant improvements to its justice system if it wants to compete with top-ranking Member States.

Slovakia is the fourth Member State ranking in the bottom five, and provided data for all but three figures. However, the Slovakian court system is ranked among the top five in the Accessibility indicator (Chart 5), which is in contrast to the negative score in other indicators. Slovakia is in the bottom five of the Length of proceedings indicator (Chart 5), the Pending cases indicator (Chart 3), the Efficiency of justice system parameter (Chart 4), and the Independence parameter (Chart 8). Court efficiency and independence are among the most important elements as regards a choice of court system. Based on the scores, litigants would be advised to avoid Slovak courts, while the court system itself would find it difficult to compete in a civil justice system competition.

Cyprus is in last place in the Scoreboard ranking, and provided data for all but six of the figures. The Cypriot court system is in the bottom five in the Length of proceedings indicator (Chart 1), the Pending cases indicator (Chart 3), the Efficiency of justice system parameter (Chart 4), the Accessibility indicator (Chart 5), the Resources indicator (Chart 6), and the Quality of justice systems parameter (Chart 7). It appears as though everything that can possibly go wrong goes wrong for the Cypriot justice system. In fact, Cyprus is constantly in the second half of the ranking in almost all of the charts. With these negative results, Cyprus should lead the list of courts to be avoided.

The third step involves an analysis of Germany and the UK as two of the most active competitors. **Germany** is ranked twelve overall, and was in the top five only for the Resources indicator (Chart 6) and the Quality of Justice Systems parameter (Chart 7). Germany did not perform very well in the Efficiency of the justice system parameter (Chart 4). For this one, Germany was constantly in the second half of the chart. German courts are not particularly known for being slow

or causing delays. The results of the Scoreboard, however, show that other Member States seem to be more efficient than Germany. It would have been interesting to compare German court efficiency with that of the UK courts, but the UK did not present data for this parameter. **The UK** is placed better than Germany in the overall ranking, where it is in seventh position. The UK, however, did not present data for the Efficiency of the justice system parameter (Chart 4) or for the Accessibility indicator (Chart 5). In the Quality of justice systems parameter (Chart 7), the UK is in second-last position. The UK apparently does not score well in the figure for the training of judges (Fig. 35). This can be explained by the different training system in the UK or by a different approach to training judges. The seventh position overall for the UK places it in front of all but one of its competitors – the Netherlands. It would have been interesting to see how the UK compares with other Member States in the other indicators.

Notwithstanding the results presented above, bottom-ranking Member States should not be overlooked or feel overshadowed by those in the top positions. First, no Member State is immune to being positioned at the bottom of the table. Cost reductions, reforms disregarding efficiency, and a reluctant attitude towards innovation can affect any Member State. Second, discussing the problems faced by bottom-ranking Member States can also help mid- or top-ranking Member States. Lessons can be learned not only on improving the situation of the court system but also on avoiding certain problems.

5.2 Overview of competition activities in Member States

Section 5.1 focused on two issues related to the justice system in the EU. The first, covered in Section 5.1.1, discussed the standpoint of the European Union on the development of civil justice systems, with particular attention being paid to the civil justice system competition. The discussion concluded that EU institutions seek to improve court system efficiency throughout the Member States; consider the court system to be an important contributing factor to economic growth and investment appeal; and compile statistics annually on the judicial systems of Member States. One part of these annual statistics is in the form of the European Judicial Scoreboard (the Scoreboard), which is a statistical instrument aimed at providing Member States with comparable data on their own and on other judicial systems. The Scoreboard was the second issue (Section 5.1.2) covered in Section 5.1. Given that it provides scores and rankings for different figures, but not a final score for the judicial system, the aim of Section 5.1.2 was to prepare a ranking list based on the Scoreboard data. The list can be used to indicate which EU Member States score better or worse. Another aim is to confront the list with the survey responses discussed in Section 5.3, which examines the choice of court

preferences of lawyers practicing in the EU. The last aim of the ranking list is to position the judicial system of Germany, England and Wales, the Netherlands, and France among the other Member States, as these four jurisdictions are actively promoting their jurisdictions to attract cross-border litigants.

This section focuses on the four judicial systems that seem to be most active in the European civil justice system competition. In addition, in focus are also Luxembourg and Denmark as two of the best Member States according to the ranking list in Section 5.1. Luxembourg and Denmark do not seem to be active in the civil justice system competition, but their highly efficient, fast, and transparent courts could be very appealing to litigants, very competitive, and a good example for other Member States.

This section analyses what it is that England and Wales, the Netherlands, Germany, and France are promoting, and whether it is supported by the Scoreboard results or other reports. Since Luxembourg and Denmark are not active competitors, this section looks at the elements of their success and what their contribution to the civil justice competition could be.

5.2.1 Denmark

Denmark was ranked third in the final ranking list derived from the Scoreboard (Chart 9), and its strong points were highlighted in Section 5.1.2.3. To recap, Denmark is among the top five in Fig. 4 ‘Time to resolve civil, commercial, administrative, and other cases’, in Fig. 11 ‘Number of litigious civil and commercial pending cases’, in Fig. 13 ‘Insolvency: Time to resolve insolvency’, in Fig. 15 ‘Electronic communications: Average length of judicial review cases against decisions of national regulatory authorities applying EU law on electronic communications’, in Fig. 18 ‘Availability of online information about the judicial system for the general public’, Fig. 21 ‘Electronic submission of claims’, Fig. 23 ‘Electronic communication’, Fig. 24 ‘Relations between courts and the press/media’, Fig. 25 ‘Access to published judgments online’, Fig. 34 ‘Compulsory training for judges’, Fig. 37 ‘Availability of training for judges on communication with parties and the press’, Fig. 44 ‘Perceived independence of courts and judges among the general public’, Fig. 46 ‘Perceived independence of courts and judges among companies’, Fig. 48 ‘World Economic Forum: businesses’ perception of judicial independence’. These figures show that Denmark excels in court transparency and perception of independence, and scores well in the speed of proceeding. Considering the analysis in Section 4.5, both transparency and court independence are important factors in choice of court for cross-border litigants. These characteristics would make Denmark a successful competitor in the civil justice competition.

The 2016 Scoreboard is accompanied by detailed country fiches for each EU Member State. Denmark's fiche does not provide additional evidence about the country's positive performance. However, the low number of first instance incoming cases is exceptional within Europe. Of all the Member States, Denmark has one of the lowest number of litigious civil (and commercial) cases. For 2014, there were 0.7 cases per 100 inhabitants, while the average for the period 2010-2014 was 0.85 cases per 100 inhabitants.⁶⁶⁹ It can be argued that a low number of litigious civil cases could benefit the efficiency and transparency of courts, and these are also Denmark's strongest points. A low rate of litigious cases can be a sign of a low litigious society, which can influence an absence of delay strategies, which on their own help to maintain a court's efficiency. It can also be a sign of successful ADR mechanisms that divert court cases to arbitration or mediation. A low litigation rate can also indicate low legal complexity and high legal predictability. Low legal complexity would allow conflicting parties to better understand the law and the procedures, while high legal/court predictability would allow them to more easily predict court decisions and legal outcomes. In such a scenario, parties would be interested in avoiding the extra costs of litigation and in settling out of the court.⁶⁷⁰ In turn, these elements can create a cycle, in which low litigation rates contribute to low legal complexity and high legal/court predictability, and low legal complexity and high legal/court predictability contribute to a low number of court cases. A low number of court cases also helps maintain an efficient court, and this way the cycle also encompasses other factors. Again, relating this to the analysis in Section 4.5, Danish courts could offer short proceeding times, low legal and procedural complexity, high court accuracy, and high court predictability. Each of these elements is important in both competition from unilateral and bilateral choice of court.

A fast processing time and transparency are among the objectives identified by the Danish government as the focus areas for the period 2013-2018.⁶⁷¹ The four main objectives for this period were a short processing time, more consistency in the performance of duties, contemporary communication, and continuity in being an attractive workplace. Details show that the Danish government wanted to improve even further the case processing time, to innovate communication with the public, and to make courts an attractive workplace. Two important topics with

⁶⁶⁹ Similar figures for litigious civil (and commercial) cases are also had by other Scandinavian Member States. Finland had 0.2 cases on average per 100 inhabitants for the period 2010-2014. Sweden had 0.7 cases on average per 100 inhabitants for the same period.

⁶⁷⁰ Denmark also scores high in promoting alternative dispute resolution methods. See Fig. 27 on the 2016 Scoreboard.

⁶⁷¹ Objectives of the Courts of Denmark <<http://www.domstol.dk/om/otherlanguages/english/visionvaluesobjectives/objectivesofthedanishcourts/Pages/default.aspx>> accessed 22 December 2017.

respect to the civil justice system competition can be isolated here. First, the Danish legal system is not only efficient and transparent but it also benefits from the will of the government to maintain these high standards. Despite the comparatively high standards of Danish courts, however, the government does not seem to be interested in the civil justice system competition.⁶⁷² This means either that the demand does not justify the effort to compete, or that benefits derived from competition do not justify participation. It can also be argued that there is no particular reason for the Danish government to abstain from competition. Second, good results in figures and statistics do not make a jurisdiction competitive or an actor in the competition process. The political will to participate, an awareness of the competitive potential, and a strong internal demand are absolutely essential.

5.2.2 England and Wales (the United Kingdom)

Despite being part of the United Kingdom, England and Wales, Scotland, and Northern Ireland have their own court systems, organised on a different basis and operating independently. Among them, England and Wales are the most active in promoting their jurisdiction to international litigants and commercial parties. London as an important commercial, financial, and administrative hub spearheads attempts to attract legal business and litigants from other jurisdictions.⁶⁷³ London's importance outshines the courts of other cities in England and Wales to the extent that when London is mentioned, England and Wales is meant, and vice versa. Since the focus of the government, litigants, and studies revolve around London, this section follows the same steps and focuses on England and Wales, with London as the point of reference.

Because the Scoreboard does not distinguish between the different jurisdictions within the UK, the performance of England and Wales cannot be directly assessed. Another difficulty is created by the lack of data for the UK, which makes

⁶⁷² A brochure on the court system in Denmark makes no reference to attracting international litigants or commercial cases. The brochure is directed more to the general public, underlining the positive aspects of Danish courts. The brochure and the information on the websites of the Danish Court Administration and the Danish Ministry of Justice likewise show no evidence of competitive action. For the English version of the brochure, see 'A closer look at the courts of Denmark': <http://www.domstol.dk/om/otherlanguages/english/publications/Publications/profilbrochure_uk.pdf> accessed 22 December 2017.

⁶⁷³ 'Factors influencing international litigants' decision to bring commercial claims to the London based courts' is a study commissioned by the Ministry of Justice of the United Kingdom and carried out in 2015 by Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants, and José del Rio from the British Institute of International and Comparative Law (hereafter the BIICL Study). The findings suggest that London is frequently chosen in cross-border cases because of the reputation of its judges and the quality of English law. The study can be found at <<https://www.gov.uk/government/publications/factors-influencing-international-litigants-decisions-to-bring-commercial-claims-to-the-london-based-courts>> accessed 22 December 2017.

it difficult to compare the UK's score with that of other jurisdictions, and, as a consequence, the score of England and Wales with that of other jurisdictions. Of twenty-nine figures analysed, the UK provided data for seven, resulting in the UK having an average score of 8.43. This score would put it in seventh place in the Scoreboard ranking. However, because of the persistent lack of data, this score is difficult to justify. On a positive note, figures for the Independence parameter (Chart 6) are complete for the UK, and here the UK is positioned seventh in the ranking, thus better than Germany (eighth) and France (twelfth). It should be noted that England and Wales were not distinguished from the other UK jurisdictions, so we cannot be sure of each jurisdiction's contribution to the final score. Apart from this limited comparison, little can be derived from the Scoreboard.

Empirical evidence suggests that England is one of the most popular jurisdictions for resolving disputes. The survey, conducted in 2015 by the present author for this study, found that the jurisdiction of England and Wales was considered the most attractive in the EU by 42.6% of the responding lawyers. The survey also revealed that 72.1% of the respondents consider England and Wales to be actively trying to attract litigants.⁶⁷⁴ Data from another survey, conducted in 2008 by the Oxford Institute of European and Comparative Law, show that England was among the top three preferred forums selected by lawyers.⁶⁷⁵ England was the forum most preferred (17%) when lawyers were asked about their preferences in the choice of forum, and the second most preferred (14%) when the same lawyers were asked for a preference that was not their home jurisdiction.⁶⁷⁶ Interestingly enough, responding lawyers considered that English courts were the ones most chosen in cross-border transactions (38%). This difference in percentage between their preference and their perceived preference indicates that lawyers overestimated the attractiveness of English courts, meaning that while they choose English courts to litigate, they consider that this choice is made more frequently by them or their colleagues. This distinction should not be overlooked. If choice makers consider that a certain choice is the most frequent in their environment, they might face psychological difficulties in not making that same choice.⁶⁷⁷ The longer this situation persists, the more important that choice becomes, until it reaches the point of becoming the default choice in that

⁶⁷⁴ See Section 5.3, in particular the analysis on Question 14 and 20.

⁶⁷⁵ The results of the survey cannot be found on the website of the Oxford Institute of European and Comparative Law. A copy of the final results can be accessed at <http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf> accessed 22 December 2017.

⁶⁷⁶ A similar result was found in the survey conducted by the author of this thesis.

⁶⁷⁷ For more, see Section 2.5.

environment. Choosing the most well-known option or the default possibility can be considered a ‘safe’ choice. If lawyers consider that the majority choose English courts, they might be inclined to do the same. If this becomes frequent, English courts can – or will be – the default courts of choice. If lawyers and clients think English courts are the ones most chosen, they will consider this as a ‘safe’ choice. This mechanism would affect how competition unfolds, with the risk of nullifying it. Several industries already use English courts as their default choice. Changing this would be difficult, and obviously a formidable obstacle to the jurisdiction competition.

Both surveys show that for businesses and lawyers England is a popular place in which to litigate. This position is reinforced by the perception that England is the most often chosen venue, and that it is the most active Member State to engage in the competition of jurisdictions in the EU. The popularity and the positive perception of English courts is well known to the government in London. Official data show that since 2010, almost 80% of all Commercial Court cases in England and Wales have involved a foreign litigant. Since 2012, in almost 50% of the cases, all the parties have been foreigners. In most of the cases (60%), their value has been above £300,000, and 16% of the total have had a value above £1 million.⁶⁷⁸ According to the Ministry of Justice, the legal sector contributed £23.1 billion in 2009,⁶⁷⁹ £20.9 billion in 2011,⁶⁸⁰ £22.6 billion in 2013,⁶⁸¹ and £25.7 billion in 2015 to the UK economy.⁶⁸² In 2009, the legal services sector generated £3.2 billion⁶⁸³ in exports, while in 2011 it generated £4 billion.⁶⁸⁴ The figures show that despite a fall in the general output of the legal sector between 2009 and

⁶⁷⁸ Lein (2015) 10.

⁶⁷⁹ Ministry of Justice, ‘Plan for Growth: Promoting the UK’s Legal Services Sector’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf>> accessed 22 December 2017.

⁶⁸⁰ Ministry of Justice, ‘UK Legal Services on the International Stage: Underpinning growth and stability’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan-0313.pdf>> accessed 22 December 2017.

⁶⁸¹ Ministry of Justice, ‘Legal Services: removing barriers to competition’, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535499/legal-services-removing-barriers-to-competition.pdf> accessed 22 December 2017.

⁶⁸² Ministry of Justice, ‘Transforming our Justice System: By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals’, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 22 December 2017.

⁶⁸³ Ministry of Justice, ‘Plan for Growth: Promoting the UK’s Legal Services Sector’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf>> accessed 22 December 2017.

⁶⁸⁴ Ministry of Justice, ‘UK Legal Services on the International Stage: Underpinning growth and stability’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan-0313.pdf>> accessed 22 December 2017.

2011, the level of exports rose. This could indicate that foreign clients have increased in importance for English law firms. To support this, the Ministry of Justice considered that ‘ninety percent of the commercial cases handled by London law firms involve an international party’.⁶⁸⁵ The lucrative legal business in London also attracts foreign law firms; over two hundred of them have offices in London.⁶⁸⁶ It can be said that London is not only a hub for English lawyers but it has also acquired a cosmopolitan image that attracts non-British parties to litigate in it.

The 2015 BIICL Study suggests that there are two primarily important factors in choosing English courts:⁶⁸⁷ the first is the experience of English judges, and the second is the prevalence of English law as choice of applicable law. Other secondary reasons influencing parties to choose London-based litigation are the well-established reputation of English courts; efficient remedies; procedural effectiveness; and forum neutrality. Furthermore, the Ministry of Justice considers world-class, highly specialised practitioners and expert judges to be the main attracting features of the British court.⁶⁸⁸ However, users of English courts are also the target of other jurisdictions that compete with British courts, even on a global scale. The Ministry of Justice considers New York, Stockholm, Paris, Geneva, Dubai, Singapore, and Hong Kong as already competing or ready to compete with London.⁶⁸⁹ The only European cities on this list are Geneva, Stockholm, and Paris, of which only the last two are part of the EU. Most striking here is that for the UK Ministry of Justice, Germany and the Netherlands are not considered to be important or even potential competitors. According to the BIICL study, London’s courts face serious competition from the courts of New York, Singapore, and EU Member States (in general, with none specified).⁶⁹⁰ Continental European courts are considered to offer more cost-efficient litigation, a good inquisitorial system, and faster results. However, the discrepancy between the findings of the BIICL study and the claims of the Ministry should not be very

⁶⁸⁵ Ministry of Justice, ‘Plan for Growth: Promoting the UK’s Legal Services Sector’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf>> accessed 22 December 2017.

⁶⁸⁶ Ministry of Justice, ‘Plan for Growth: Promoting the UK’s Legal Services Sector’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf>> accessed 22 December 2017.

⁶⁸⁷ Lein (2015) 2-3.

⁶⁸⁸ Ministry of Justice, ‘Plan for Growth: Promoting the UK’s Legal Services Sector’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf>> accessed 22 December 2017.

⁶⁸⁹ Ministry of Justice, ‘Plan for Growth: Promoting the UK’s Legal Services Sector’, available at <<https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan.pdf>> accessed 22 December 2017.

⁶⁹⁰ BIICL Study p. 4.

surprising, as the claims of the Ministry of Justice seem to be based on anecdotal evidence, while the BIICL study bases its claims on an empirical study.⁶⁹¹ An undeniable fact is that on a global scale London is one of most attractive jurisdictions, and is actively trying to maintain and reinforce this position.

Since at least 2003, the Ministry of Justice in partnership with the legal profession has been active in promoting the British legal sector – and with it London’s courts – overseas. Promotion as well as strategic trade agreements with emerging markets have been aimed at facilitating the access of UK legal services in these markets. To complement this, the Law Society of England and Wales has promoted links between countries like South Korea, Russia, Brazil, Malaysia, Qatar, and Oman. Similar promoting activities have been carried out by UK Trade & Investment, the Foreign and Commonwealth Office, the Department for Business Innovation and Skills, the HM Treasury, the Bar Council, TheCityUK, and the City of London Corporation. The diversity and the number of actors involved demonstrate the enormous and complex economic and political interest in attracting legal business. To justify the promotion and the related interest, the UK government is constantly trying to reform the legal sector, including courts and related services. As part of the reforms, the Rolls Building was inaugurated in 2012 to host the Chancery Division of the High Court, the Admiralty and Commercial Court, and the Technology and Construction Court. Although this might not sound impressive, choosing the right English court is often complicated and difficult for foreign users. Having these courts under the same roof and simplifying the system seems to be the underlying purpose of this initiative. In September 2016, a joint publication by the Ministry of Justice, the Lord Chief Justice of England and Wales, and the Senior President of Tribunals laid out their common plan to transform the justice system over the next few years.⁶⁹² This transformation is aimed at increasing accessibility to courts, improving the proportionality of costs, and improving and maintaining the image of a fair court. The government plans to spend £700 million in improving the courts’ structure and infrastructure, and aims to speed up the resolution of conflicts in courts, make costs proportionate to the case, make costs more predictable, and increase courts’ accuracy. Online innovations, changes in the costs calculations, mergers of courts, and structural reforms can be expected in the future. The feeling is that no matter what reforms the government in London enacts, it always plays the fanfare of success and of being ‘the best court in the world’. However, Brexit and its

⁶⁹¹ This survey is discussed in Section 5.3.1.3.

⁶⁹² Ministry of Justice, ‘Transforming our Justice System: By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals’, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 22 December 2017.

unpredictable consequences might change the rules of the game that London has become used to playing.

5.2.3 France

France is home to several arbitration institutions that attract litigants on a global scale.⁶⁹³ While arbitration services are aware of their role and try to maintain their leading position, French legal actors have been criticised for not sufficiently appreciating the importance of law as an economic instrument.⁶⁹⁴ With reference to the scores calculated in Section 5.1, France occupies the twenty-sixth position, while having provided data for all but one of the figures taken into account. France is placed among the bottom five in three indicators: Accessibility, Resources, and Clearance Rate. Of these, Accessibility and Resources are the most important in the civil justice system competition. A jurisdiction becomes unattractive when it is comparatively difficult to access its courts, and when these courts do not have enough resources. It can be suggested that lack of resources affects French results in other figures as well, which would explain why scores are mediocre and France never reaches the top.

Despite the discouraging Scoreboard score, however, France is actively trying to promote its jurisdiction for international litigation. To this effect, in 17 January 2011, the Paris Commercial Court opened the doors of a new division, which was able to assess evidence in several languages, among others English, German and Spanish.⁶⁹⁵ As explained by the President of the Court, the aim of this initiative was to increase the attractiveness of the court.⁶⁹⁶ While the initiative is to be applauded, the effects are limited. The initiative allows litigating parties to present

⁶⁹³ Some arbitration institutions with their seat in Paris are the French Association for Arbitration (AFA), the Centre for Mediation and Arbitration of Paris (CMAP), the International Arbitration Chamber of Paris (CAIP), Chambre Arbitrale Maritime de Paris (CAMP), and Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale. In 2009, various institutions interested in promoting Paris as an arbitration venue created the not-for-profit organisation 'Paris, the Home of International Arbitration'. This organisation promotes Paris as the world's leading venue for arbitration. The aim of this organisation is not hidden. Fending off competition and maintaining the image of a good brand is the most obvious stance in a lucrative and aggressive business environment. The website of the Paris, the Home of International Arbitration is available at <<http://parisarbitration.net/en/>> accessed 22 December 2017.

⁶⁹⁴ Durand-Barthez, Pascal. 'Economic Aspects of Law: A Partnership between the Foundation and HEC Paris' <<http://www.fondation-droitcontinental.org/en/document/economic-aspects-of-law-a-partnership-between-the-foundation-and-hec-paris/>> accessed on 22 December 2017.

⁶⁹⁵ Kern (2012) 195-196.

⁶⁹⁶ Gilles Cuniberti, 'Paris, the Jurisdiction of Choice?' (Conflict of Laws, 2 February 2011) <<http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/>> accessed 22 December 2017.

evidence in a foreign language, but the rest of the process is conducted in French. While this is step forward, it can be imagined that litigants expect something more. To this effect, the *Foundation pour le Droit Continental* (Foundation)⁶⁹⁷ and the *Hautes Etudes Commerciales de Paris* (HEC Paris) joined forces in 2011 to gather information on the legal industry's estimated economic weight in France. A noteworthy result of this collaboration was an empirical study on choice of law in international contracts in France.⁶⁹⁸ Four kind of contracts were surveyed: sales of goods; construction and similar contracts for large projects; mergers and acquisitions; financial contracts; and arbitration agreements. To the disappointment of the French researchers, however, the results showed that English law and US law were the most chosen, despite having no clear superiority over French law in particular and continental law in general.⁶⁹⁹ The study also suggests that the choice of law seems to be affected by psychological and other extra-judicial factors, which pose problems to competition, as they can be more difficult to detect and to respond to.

The study insists that choice of law has economic consequences, and that this concept is not fully developed in France, which should pay more attention to the legal industry's economic importance. As reported in the study, the turnover of the French legal sector for 2008 was €18.3 billion for a workforce of 160,000 persons.⁷⁰⁰ The authors of the study consider this turnover to be inaccurate, and they estimate the turnover of the French legal business in 2008 at around €24 billion. Data provided by the French national office of statistics provide more insights into the strength of the French legal sector. The turnover for the last few years has been €17.96 billion in 2009, €20.19 billion in 2010, €20.10 billion in 2011, €19.89 billion in 2012, €19.72 billion in 2013, €19.61 billion in 2014, and €20.29 billion in 2015.⁷⁰¹ These data suggest that the legal sector's turnover has been somehow stable, especially since 2010. It should be noted that this is not the

⁶⁹⁷ The Foundation was created in 2007 to promote discussions and studies on Romano-Germanic law.

⁶⁹⁸ The results of the research are published in: Lenglard F. Choisir son droit-conséquences économiques du choix du droit applicable dans les contrats internationaux. 2012.

⁶⁹⁹ Durand-Barthez (2012) 510.

⁷⁰⁰ Durand-Barthez (2012) 516.

⁷⁰¹ Data obtained from the French institute of statistics, Institut National de la Statistique et des Etudes Economique (INSEE). Legal activities bear the statistical code M69Z1 Activite Juridique, part of the higher level section M69Z Legal and Accounting Activities (Activite Juridique et Comptables). On 21 November 2016, the website of the INSEE was overhauled, and does not provide detailed statistics for legal activities (activite juridique). Details are provided only for the higher level section Legal and Accounting Activities (Activite Juridique et Comptables). Aggregate data for both the legal and the accounting sector can be obtained at <<https://www.insee.fr/en/statistiques/2387899?sommaire=2387999>> accessed 22 December 2017.

total turnover of the French legal sector, as the activity generated by courts and in-house lawyers is missing. Thus, the total turnover can be expected to be higher, as suggested by Durant-Barthez. Court budget per capita in France was €60.5 in 2010, €61.2 in 2011, €62.0 in 2013, and €64.1 in 2014,⁷⁰² which is less than Germany, Luxembourg, and the Netherlands had spent on their courts. It is worth mentioning that France achieved these results without a particular focus on competing with other jurisdictions or trying to attract more litigants, as was the case with the UK. If this is true, France might have more potential to exploit by engaging in competition.

The websites of the Ministry of Justice of France and of the Chamber of Advocates are silent as regards competition. Of course, the Ministry of Justice maintains a brochure explaining and praising the French legal system. First, however, it is a brief description of the legal system in France (similar to the Danish brochure), and second, it is not aimed at attracting international litigants.⁷⁰³ Nevertheless, in contrast, French arbitrators take the promotion of their business very seriously. ‘Paris, the Home of International Arbitration’ is a not-for-profit association created in 2009 for the sole purpose of promoting Paris as a site of international arbitration.⁷⁰⁴ The long membership list shows the interest of law firms in promoting Paris as an arbitration venue and thereby procuring more work for themselves. Similar activities in promoting French courts by litigation lawyers are missing. As an exception to this, however, the Foundation has tried to stir up more promoting activities for French courts. The first step was the collaboration with the HEC and the study it produced. Because the study was designed and conducted by French authors and not by foreigners, it must have helped the Foundation realise that French law and courts are far from being the most popular in terms of choice of court.⁷⁰⁵ As a response to this, and in collaboration with German partners, the Foundation published a brochure titled

⁷⁰² CEPEJ study on the functioning of judicial systems. France (2014 data), p. 211.

⁷⁰³ The current brochure is titled ‘The French legal system’. It is dated 22 December 2012 and can be found on the website of the French Ministry of Justice: <http://www.justice.gouv.fr/art_pix/french_legal_system.pdf> accessed 22 December 2017. An earlier version of the brochure titled ‘French legal expertise’ made in collaboration with the Ministry of Foreign Affairs can be found at <http://www.justice.gouv.fr/art_pix/expertise_juridique_francaise_an.pdf> accessed 22 December 2017.

⁷⁰⁴ Paris, the Home of International Arbitration <<http://parisarbitration.net/en/>> accessed 22 December 2017.

⁷⁰⁵ Other incentives to begin promoting French courts also resulted in the publication of brochures in England and Germany, promoting their respective legal system. While praising the qualities of the systems, the brochures indirectly had a negative effect on the reputation of France.

‘Continental law: global, legally certain, economic, flexible’.⁷⁰⁶ It was published in 2011, but has not been updated since then. While it is not certain who took the initiative to publish the brochure, the German contribution seems to outweigh the French one. This brochure also remains the last attempt at promoting or engaging in any sort of competitive activity in support of French courts.

The legal sector in France seems to have made an important contribution to the economy, despite the relatively small amount per capita granted to the juridical system. Considering the case of arbitrators, international litigation seems to be interesting for French lawyers. This interest, however, is not translated into actions to promote the French court system but into responses to the English activities. English undertakings are aimed at promoting their common law system, while French actions try to promote the Romano-Germanic law system. In doing this, France has in Germany its strongest ally.

5.2.4 Germany

The Scoreboard results, analysed in Section 5.1, place Germany in the twelfth position, following the provision of data for all but five of the figures. Data show that Germany does not perform well in the ‘Efficiency of justice system’ parameter (eighteenth position), but does better in the ‘Independence’ parameter (third position), and in the ‘Quality of justice systems’ parameter (third position). The final score suggests that Germany’s court system is average compared to that of other Member States. The quality of the justice system is boosted also by the considerable budget allocated to courts, with courts and the judicial system receiving €105.8, €114.3, and €108.9 per capita in 2010, 2012, and 2013, respectively.⁷⁰⁷ This is almost double compared to the French court budget. According to the data of the German statistics authority, Statistisches Bundesamt, the turnover of the legal sector was €19.5 billion in 2012, €20.1 billion in 2013, and €22.2 billion in 2014.⁷⁰⁸ These figures are comparable with those of France, which is counterintuitive, considering Germany’s bigger population and its stronger economic power. However, this does not mean that the legal business is not lucrative for law firms, and outside the radar of the German government. In fact, there are several endeavours underway to promote Germany as an international litigation venue.

As with France, Germany’s attention to the competition of civil justice systems was spurred by a Law Society brochure in 2007. It was surprising to German

⁷⁰⁶ The brochure is published in English and in German. It is offered on a dedicated website at <<http://www.kontinentalesrecht.de>> accessed 22 December 2017.

⁷⁰⁷ CEPEJ study on the functioning of judicial systems. Germany (2014 data), p. 232.

⁷⁰⁸ Statistisches Bundesamt: <<https://www-genesis.destatis.de/genesis/online/dataau=Willkommen>> accessed 22 December 2017.

scholars that the English were promoting aspects of their court system that were not as good as or worse than in Germany.⁷⁰⁹ In this regard, the federal Ministry of Justice of Germany prepared and published a brochure in 2008. The brochure is titled ‘Law Made in Germany’ and is still being updated and published in German, English, French, Arabic, Chinese, Russian, and Vietnamese.⁷¹⁰ Clearly this is an attempt to promote German courts in all the most popular languages in the world (though Spanish is missing). The brochure is endorsed by lawyers’, notaries’, and judges’ associations, and it exalts three characteristics of the German system: namely, global, effective, and cost efficient. These characteristics are important for businesses, of course, and the brochure emphasises them even more. Examples are used to show cases where the superiority of German law saves either time, or costs, or efforts, or all of them together. However, there are no data available as to whether the brochure has been successful in making German law and courts better known, or whether it has brought more revenue to German law firms. Turnover data from the Statistisches Bundesamt cover only the period 2012-2014. Nevertheless, Germany collaborated with France to produce another brochure, the ‘Continental Law’ brochure,⁷¹¹ although the brochure has not been updated since at least 15 May 2012, the last day that Michel Mercier was Minister of Justice of France. Evidently, German support was focused on the ‘Law Made in Germany’ project, while France lost interest. The Continental Law brochure was a surrogate copy of the German brochure, with almost the same motto and with additional examples that included not only German law but also French law. Inspired by prospects of market gain in view of Brexit, 30 March 2017 saw the launch of The Justice Initiative Frankfurt am Main.⁷¹² The initiative aims at promoting Frankfurt as a hot spot for commercial litigation in the EU. It started with a conference organised by the Minister of Justice of the Federal State of Hessen. Frankfurt is already an important financial centre in Europe, with many international firms being located there. It seems only logical that the local government is interested in attracting foreign litigants. The plan of measures for this initiative proposes the creation of a comprehensive strategy to strengthen Frankfurt as a hub for international dispute settlement, the establishment of a sections specialised in international commercial matters in the courts of Frankfurt, rethinking the design

⁷⁰⁹ Calliess and Hoffmann (2009) 117. In general, see also Kötz (2010).

⁷¹⁰ Law Made in Germany: <<http://www.lawmadeingermany.de>> accessed 22 December 2017.

⁷¹¹ Continental Law: <<http://www.kontinentalesrecht.de>> accessed 22 December 2017.

⁷¹² Peter Bert, ‘Frankfurt vs London – Brexit: An Opportunity for Frankfurt to Become a New Hub of Litigation in Europe?’ (Dispute Resolution in Germany, 15 March 2017) <<http://www.disputeresolutiongermany.com/2017/03/frankfurt-vs-london-brexit-an-opportunity-for-frankfurt-to-become-a-new-hub-of-litigation-in-europe/>> accessed 22 December 2017.

of the court process, and obtaining the lawyers' support for the implementation.⁷¹³ The measures proposed seem to address important elements for the attractiveness of a jurisdiction. It is interesting to note that the drafters of the proposed measures consider the help of lawyers and other interested groups as crucial for the success of the initiative. It remains to be seen what the effects of this initiative will be.

Germany shows clear signs of interest in attracting litigants in its courts, and in encouraging businesses to use its laws for their transactions. The Scoreboard results demonstrate that Germany has a qualitative and independent judicial system. In addition to these, qualities Germany's role as the economic motor of Europe clearly explains its desire to increase the use of its law in international litigation.

5.2.5 Luxembourg

The Scoreboard results put Luxembourg in first place, following the provision of data for all but eight of the figures analysed in Section 5.1. Data show that Luxembourg is twelfth among the Member States for the 'Efficiency of Justice System' parameter, fourth in the 'Quality of justice systems' parameter, and fourth for the 'Independence' parameter. According to the data, the Luxembourgish court system appears to be among the most efficient and independent in the EU. The legal system in Luxembourg had a turnover of €1 billion in 2011, €1.1 billion in 2012, €1.2 billion in 2013, and €1.4 billion in 2014.⁷¹⁴ These figures are important, considering the size of Luxembourg and the number of persons employed.⁷¹⁵ In Luxembourg, the amount granted to the judicial system per capita was €143.5 in 2010, €152.3 in 2012, €142.7 in 2013, and €139.4 in 2014.⁷¹⁶ The sum granted to the courts per capita is almost one and a half times higher than in Germany. From these figures, it is clear that the legal sector in Luxembourg is economically important, while the fact that Luxembourg is small (in size and population) could mean that the civil justice system competition would be lucrative for it. It is worth remembering that part of Delaware's success and interest in the competition to incorporate is its small size. Perhaps Luxembourg can be the Delaware of Europe in the civil justice system

⁷¹³ Matthias Weller, 'The Justice Initiative Frankfurt am Main' (Conflict of Laws, 31 March 2017) <<http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>> accessed 22 December 2017.

⁷¹⁴ Data obtained from the Statistical Portal of the Grand-Duchy of Luxembourg. Data can be accessed at <<http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx>> accessed 22 December 2017. NACE 2 code for the advanced search function is M691.

⁷¹⁵ In total, 4407 persons were employed in the legal industry in Luxembourg in 2014.

⁷¹⁶ CEPEJ study on the functioning of judicial systems. Luxembourg (2014 data), p. 393.

competition, and the fact that it has an important financial industry could be an additional advantage.

Two of the top one hundred European law firms are in Luxembourg, and four other top one hundred European law firms have branches there.⁷¹⁷ Of the top one hundred global law firms, nine have branches in Luxembourg.⁷¹⁸ Luxembourg as the home of European courts and institutions is a natural site to expand to include international law firms, which raises questions as to why law firms would establish themselves there. Is it for the courts? Or to be near EU institutions? Or are there any other reasons? The Oxford survey results do not show Luxembourg to be among the top preferences for the respondents. From the survey results conducted for the present research, Luxembourg's courts were considered the most attractive by 1.92% of the respondents, as the second best by 1.48%, and as the third best by 2.81% of the respondents. One respondent commented that Luxembourg is 'known for the quick instruction of cases in employment and commercial matters'. While the comment is not a final proof, it is in line with the Scoreboard findings as regards the efficiency of Luxembourg's courts. However, the data is discouraging. Considering that 3.02% of the respondents operated mainly in Luxembourg, and 9.26% of the total respondents had had professional experiences with Luxembourgish courts, Luxembourg's appeal seems low. It appears that even some of the lawyers operating there do not consider its courts attractive.

Perhaps the government of Luxembourg should increase its marketing efforts to retain local litigants and to attract international clients. The only promotion regarding Luxembourgish courts and laws is being made via 'Luxembourg for Finance', which is a website maintained by the Agency for the Development of the Financial Centre (ADFC).⁷¹⁹ ADFC is a partnership between the Luxembourgish Government and the Luxembourg Financial Industry Federation. The aim of Luxembourg for Finance is to promote the finance sector and to attract investors from abroad. Among the attractive elements advertised is the legal environment, with clear business-oriented law and fast competent courts. Although some promotion exists, it cannot be considered as being on the same

⁷¹⁷ The list of the top one hundred European law firms was compiled by The Lawyers, and uses their declared turnover to make the classification. The list excludes British and US law firms, which are considerably bigger than European law firms. The report for 2014 was accessed at <<http://www.thelawyer.com/analysis/intelligence/european-100-2014/european-100-2014-ranking/>> accessed 27 October 2016. The link has been removed, and the report can be purchased through The Lawyer website.

⁷¹⁸ The American Lawyer (2014).

⁷¹⁹ For the English version of the website, visit <<http://www.luxembourgforfinance.com/en>> accessed 22 December 2017.

level as the German and English efforts. Luxembourgish promotion is aimed at investors with a limited knowledge of law, and the reason for promoting the legal element is to show that Luxembourg is fully equipped with laws that facilitate financial investments.

It is surprising to see that while the legal sector is an important contributor to the economy of Luxembourg, little is done to promote it. While some Member States do not have courts as qualitative as those of Luxembourg, they promote them with pride. The reasons for Luxembourg's passive attitude should be further studied, since the suggestion would be for Luxembourg to start promoting its courts to international litigants.

5.2.6 The Netherlands

The Netherlands is one of the four EU Member States that displays clear signs of willingness to compete and attract international litigants. In the Scoreboard results, the Dutch judicial system is second. The Netherlands scored tenth in the Efficiency of the Judicial System parameter, fifth in the Quality of Justice Systems parameter, and fifth in the Independence parameter. The positive note from the Scoreboard is that the Netherlands never appeared in the lower half of the table, making it comparatively better than most of the Member States. The quality of the civil justice system is without doubt a contributor to the economy of the country. The turnover of the Dutch legal sector was €1.19 billion in 2010, €1.23 billion in 2011, €1.15 billion in 2012, and €1.1 billion in 2013.⁷²⁰ However, while in all the other Member States analysed here the legal industry's turnover has increased annually, in 2012 and 2013 the Netherlands experienced no apparent growth. To maintain the judicial system, the Dutch government spent €125.5 per capita in 2010, €127.3 per capita in 2012, €128.6 per capita in 2013, and €123.4 per capita in 2014.⁷²¹

Six Dutch law firms were in the list of the top one hundred European law firms.⁷²² One of them, Loyens & Loeff, was among the global top one hundred, according to *The American Lawyer*.⁷²³ Thirteen of the top global law firms have offices in

⁷²⁰ Data on the legal service turnover can be obtained from the website of the Central Bureau of Statistics (Centraal Bureau voor de Statistiek) at <<https://www.cbs.nl/en-gb>> accessed 22 December 2017. The code required to access the legal sectors' turnover statistics is M691.

⁷²¹ CEPEJ study on the functioning of judicial systems. Netherlands (2014 data), p. 436.

⁷²² The top one hundred European law firms is compiled by *The Lawyers*, and uses their declared turnover to make the classification. The list excludes British and US law firms, which are considerably bigger than European law firms. The report for 2014 was accessed at <<http://www.thelawyer.com/analysis/intelligence/european-100-2014/european-100-2014-ranking/>> accessed 27 October 2016. The link has been removed, and the report can be purchased through *The Lawyer* website.

⁷²³ *The American Lawyer*, October 2014.

the Netherlands. Considering the sizes of local law firms, the presence of international law firms in the country, and their contribution, it can be argued that the legal market is very important for the Dutch economy. Data from the Oxford Survey suggests that the Netherlands was the preferred litigation forum for 6% of the respondents, but this dropped to 3% if the respondents were not able to choose their home jurisdiction. In the last case, the Netherlands is placed fourth among all the other EU Member States. Only Germany, France, and England fared better. More recent data from the survey conducted for this research in 2015 show that 11.51% of the respondents consider the Netherlands to be the most attractive jurisdiction in the EU, 16.91% consider it to be the second best option, and 10.53% consider it to be the third best option. This share of respondents means that the Netherlands is the third most preferred jurisdiction in the EU. The analysis should take into account that 14.93% of the respondents were from the Netherlands, which might have influenced their choice.⁷²⁴ Some of the respondents highlighted specific elements that led them to prefer the Netherlands. Indications strongly suggest that the court system in the Netherlands is highly qualitative and potentially competitive within the EU.

The quality of the Dutch courts and the resulting potential benefits have long been under scrutiny in the Netherlands. The aims in these regards have been to make courts more efficient in handling cases and to reduce the financial burden for the public pocket. Such aims involve not only improving the legal framework of the courts but also their infrastructure.⁷²⁵ Infrastructure in courts has been improved by implementing state-of-the-art information technology, and by facilitating long-distance communication with court users. As regards the legal framework, two developments are worth mentioning. The first is the ‘Act on collective settlement of mass damage claims’ (*Wet collectieve afwikkeling van massaschades*, WCAM), which was adopted in 2005 and modified in 2013. The WCAM allows

⁷²⁴ See Section 5.3.

⁷²⁵ Publications of the Dutch Council for the Judiciary provide more details about this. See Agenda for the Judiciary 2008-2011 <<https://www.rechtspraak.nl/SiteCollectionDocuments/Agenda-for-the-Judiciary-2008-2011.pdf>> accessed 22 December 2017; The Financing System of the Netherlands Judiciary <<https://www.rechtspraak.nl/SiteCollectionDocuments/The-Financing-System-of-the-Netherlands-Judiciary.pdf>> accessed 22 December 2017; ‘Europeanisation of law’: Consequences for the Dutch Judiciary <<https://www.rechtspraak.nl/SiteCollectionDocuments/Europeanisation-of-the-law.pdf>> accessed 22 December 2017; The value of the judicial infrastructure for the Dutch economy <<https://www.rechtspraak.nl/SiteCollectionDocuments/The-value-of-the-judicial-infrastructure.pdf>> accessed 22 December 2017; Quality of the judicial system in the Netherlands <<https://www.rechtspraak.nl/SiteCollectionDocuments/Quality-of-the-judicial-system-in-the-Netherlands.pdf>> accessed 22 December 2017; Strategic Multi-Annual Planning for the Netherlands Judiciary <<https://www.rechtspraak.nl/SiteCollectionDocuments/Strategic-Multi-Annual-Planning.pdf>> accessed 22 December 2017.

large groups of harmed individuals to agree to a settlement with the party suspected of having caused the damage. Parties follow the procedures set out in the law to reach an agreement out of court, while the role of the court is minimal, consisting mainly of supervising the process and issuing a final decision based on the settlement negotiations. Settlements in other Member States might be complicated, costly, and time consuming, which makes the WCAM an attractive procedure for international litigants.⁷²⁶ In addition to this, the Dutch government is currently discussing the introduction of a collective damage action. While the proposal is under discussion, it remains interesting to see how much international litigation it will attract.⁷²⁷ In this regard some concerns have been raised by the Institute for Legal Reform (ILR) of the US Chamber of Commerce, which considers the EU's approach to collective redress as dangerous for the delivering of justice and economic development.⁷²⁸ In a study prepared on this issue, the ILR mentions the Netherlands and England as the most competitive jurisdictions in this area, while Brexit is expected to provide an advantage to Dutch courts.⁷²⁹ The ILR considers that the Netherlands might be at risk of harming large companies with predatory law suits financed and supported by specialised law firms.⁷³⁰ Nevertheless, it should be also considered that the ILR conveys the interest of commercial companies, which find mass litigation annoying at best, and therefore oppose collective damage actions. How competitive the Netherlands will be, what effects will collective damage actions will have, remains to be seen. The second development is that the Netherlands has decided to create a specialised commercial court, the Netherlands Commercial Court (NCC), which will deal with international commercial cases. The law creating the court was under discussion until 1 February 2017. It is now expected that the court will open its doors in Amsterdam on 1 January 2018, with the intention of hearing one hundred

⁷²⁶ In fact, the WCAM procedure has already been used for a number of global settlements. For more, see Kramer (2014).

⁷²⁷ Ianika Tzankova, 'The Dutch bill on collective damages action' (Conflict of Laws, 29 November 2016) <<http://conflictoflaws.net/2016/new-dutch-bill-on-collective-damages-action/>> accessed 22 December 2017.

⁷²⁸ Lisa A. Rickard, 'A European Crossroads for Collective Actions' (Institute for Legal Reform, 24 March 2017) <<http://www.instituteforlegalreform.com/resource/a-european-crossroads-for-collective-actions-i>> accessed 22 December 2017.

⁷²⁹ The study of the ILR can be accessed here <http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf> accessed 22 December 2017.

⁷³⁰ Dutch News, 'US Chamber of commerce warns of risks of Dutch class action system' (29 September 2017) <<http://www.dutchnews.nl/news/archives/2017/09/us-chamber-of-commerce-warns-of-risks-of-dutch-class-action-system/>> accessed 22 December 2017.

cases a year at the first instance level and twenty-five at the appellate level.⁷³¹ It is anticipated that the court will create €60 to €75 million worth of benefits per year for the government, while the costs are expected to be less than €3 million per year.⁷³² The benefits seem clear for the government. On the one hand, complicated cases that might congest courts will be diverted to a specialised court, while on the other hand, concentrating international commercial cases in one court will allow for the better specialisation of judges, the faster handling of the cases, and fewer costs in general. The reform comes with benefits for litigants as well. A specialised court, with fast proceedings and specialised judges, creates the conditions for more accurate, more predictable decisions, and for lower costs. In addition, the NCC may hold proceedings in English, which further reduces costs for parties. The aim of the court is clear: namely, to facilitate litigation for international business and possibly to attract parties from abroad.

The case of the Netherlands is very interesting compared to the other Member States considered in this section. The Netherlands has a very good Scoreboard result, which would be the best promoting asset in the civil justice system competition. This promotion, however, is almost entirely absent, which is interesting given that the Netherlands is taking concrete steps to attract international litigants. However, both the WCAM and the NCC can be seen as steps that are more serious than the various brochures published by other Member States.

5.3 A survey on the choice of court in the European Union

This section offers the description, the data, and the analysis of a survey conducted in October and November 2015 for the purpose of this research. The survey was aimed at lawyers working for the biggest law firms in the European Union, and they were mainly asked questions related to their practical professional experience of choice of court. While Sections 3.1 and 3.2 of this chapter can be seen as dedicated to the supply side of the civil justice system, this section takes on the demand side of the market and its preferences. Annexes with detailed

⁷³¹ Or at least the law on the NCC will enter into force on 1 January 2018. See 'Moving towards the Netherlands Commercial Court' <<https://legalknowledgeportal.com/2017/02/23/moving-towards-the-netherlands-commercial-court/>> accessed 22 December 2017; Planning of the Netherlands Commercial Court <<https://netherlands-commercial-court.com>> accessed 22 December 2017.

⁷³² Raad voor De Rechtspraak, 'Plan tot oprichting van de Netherlands commercial court' Raad voor de Rechtspraak (November 2015) <<https://www.rechtspraak.nl/SiteCollection-Documents/plan-netherlands-commercial-court.pdf>> accessed 22 December 2017.

questionnaires along with detailed data can be found following the concluding chapter of this book.

5.3.1 Overview of similar surveys

At this stage, it is appropriate to reflect on some surveys, whose aim is somewhat similar to the one discussed in this section. Three empirical studies are considered important for this research. Reflecting on previous empirical research helps this study to better define the approach to the empirical aspect, as well as to more effectively delineate the methodology, and to determine what questions of interest were not covered or not sufficiently investigated.

5.3.1.1 Civil Justice Systems in Europe: a study by the Oxford Institute of European and Comparative Law and Oxford Centre for Socio-Legal-Studies

Starting in chronological order, the first to be examined is the survey Civil Justice Systems in Europe (2008) conducted by the Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal-Studies.⁷³³ The authors have published only the ‘Final Results’, which are processed data regarding every question in their survey. No details of their methodology or analysis of the results have been published so far, and, considering how much time has passed, nothing is expected in the future.⁷³⁴ The foreword to the ‘Final Results’ provides some information on the methodology used to conduct the survey. Based on this and on the content of the survey, the authors’ aim seems to have been to investigate which law and court are the most preferred by businesses in Europe. In addition, the survey also asks questions related to alternative dispute resolution mechanisms, and to the general perception of party autonomy. The survey was conducted by means of telephone interviews with one hundred businesses spread across Europe. It is not clear how and why these businesses or jurisdictions were selected. The lack of methodology descriptions makes the results of this survey vulnerable to criticism. Considering this, any replication of this survey seems difficult. It is hoped that in the future, the authors will provide more information on the survey.

The majority of the respondents came from eight Member States (France, Germany, Netherlands, Poland, Spain, the UK, and Belgium). Timewise, the survey was conducted in two parts, with some respondents contacted between January and March 2008, and others between June and July 2008. Questions were

⁷³³ The results of the survey cannot be found on the website of the Oxford Institute of European and Comparative Law. A copy of the final results can be accessed at <http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2013/12/oxford_civil_justice_survey_-_summary_of_results_final.pdf> accessed 22 December 2017.

⁷³⁴ The exception is an article by Vogenauer (one of the leaders of the survey project), in which the author provides a brief analysis of the survey. See Vogenauer (2013).

grouped into seven sections, and respondents were asked about themselves, about their company, their general view on the civil justice system, their choice of governing contract law, choice of dispute resolution forum, harmonisation of national civil justice systems in Europe, and alternative dispute resolution. Ninety-one percent of the respondents were part of their firm's legal department. Companies included in the sample were relatively large, with 95% of them having more than two hundred and fifty employees, and with global headquarters in France, Italy, Germany, and the US. Their business activities included, among others, manufacturing and construction, technology, consumer and retail, and health care and lifesciences. Respondents were based mainly in Germany, England, Italy, and France (68% of the total number of respondents), and more than half (59%) were 'reasonably familiar' with the civil justice system of another jurisdiction. The US, England, France, and Germany were the jurisdictions with which respondents were more 'reasonably familiar'.⁷³⁵

From these results, it seems that the average respondent was a professional working in the legal department of a large international company. Knowing a respondent's qualities and his/her competences generally provides useful information on his/her ability to answer a survey's core questions in a meaningful manner. In this case, however, the average respondent's profile does not provide enough information regarding competency – in this instance, the ability to make a reasoned decision based on one's acquired knowledge and experience, and to make this decision applicable and impactful. In other words, the best respondents should be ones with extensive work experience,⁷³⁶ and in a top-level position in their organisation. Work experience is related to the knowledge acquired while practicing a profession, while position within the hierarchy of the company is related to the ability to influence that company's choice of forum or choice of law. Taking this into account, it can be argued that the results of the survey would have been more beneficial if it had indicated whether respondents were experienced professionals able to exert that type of influence.

Choosing companies to answer a survey on the choice of forum bears risks. These are mainly related to the companies' ability to make an independent choice of law or choice of forum decision, and three factors need to be considered. First, the company's bargaining power. Companies with strong bargaining power are able to impose their choice on other contracting parties, including choice of court

⁷³⁵ Question 5.3 'Do you happen to be reasonably familiar with the civil justice system of another jurisdiction?', followed by Question 5.4 'Yes, the civil justice system(s) of...'.

⁷³⁶ Extensive work experience does not automatically translate into reasoned decisions. It does serve, however, as a vehicle to acquiring knowledge and then actively using it in any professional setting.

clauses. Bargaining power is influenced by a number of factors that can be grouped into five categories: demand and supply conditions, market concentration, private information, patience and risk aversion, and negotiation skills and strategy.⁷³⁷ Taking these elements into account, the size of the company does seem to be an influencing factor in terms of bargaining power. Size can influence one of the factors mentioned above, but cannot be equated to any one of them. For the survey in question, this means that the size of companies does not say much about their bargaining power, and consequently about their ability to make independent choice of court decisions. It can be argued that the best respondents for such a survey would be leading companies in a certain market, able to whip up the demand for the choice of court and choice of law.

Second, companies are known to rely on external lawyers to help them with certain legal issues, and the extent of this reliance varies. Some companies need external lawyers on an everyday basis, while others do not need them at all. Between these two extremes there can be many combinations of collaborations between external lawyers and companies. Companies also require the presence of external lawyers in cases when a choice of court needs to be made. In this respect, two situations can be distinguished: one in which an external lawyer is not present during the choice of court process, and one in which an external lawyer is present. If an external lawyer is not present, companies choose the court and the forum that they consider appropriate. If an external lawyer is present, it can be argued that he/she makes the choice of court and the company follows the lawyer's advice. In fact, the reason external lawyers are hired is to advise. Furthermore, managers tend to follow the external lawyer's advice so that any blame for a poor choice can fall on the lawyer.⁷³⁸ From my survey, responses suggest that even though lawyers (respondents) discuss with their clients the choice of court agreement, clients rarely make the final decision.⁷³⁹ In the end, it seems more probable that lawyers (external lawyers) make the choice of court decision, and are therefore the best group to be surveyed.

Third, choice of court is also influenced by the type of contract parties enter. Standard contracts in a certain market oblige market actors to use them with little

⁷³⁷ Choi and Triantis consider these factors to be important in determining the price during negotiations. Negotiations are a conformation of the parties' bargaining, the result of which is the price of a good. The same bargaining power is used to draft other clauses in the contract, including the choice of court clause. Therefore, the elements considered by Choi and Triantis can be extended to the situation where choice of court is applied. Choi and Triantis (2012) 1675.

⁷³⁸ The characteristics of the lawyers market and of the law allow lawyers to dominate the lawyer-client relationship, and therefore to make the choice of court decision. See discussion in Section 4.3.

⁷³⁹ This conclusion is based on the responses to Questions 10 and 11. See Section 5.3.3.

possibility for change. These situations do not allow parties to choose, and therefore their contribution to the demand side of the market is dubious at best. Standard contracts deserve special attention and more dedicated research. These three factors underline the unpredictability of a company's ability to make an independent choice of court decision. Choice of court seems to be closely connected with lawyers and, where applicable, with external lawyers. As a consequence, lawyers as a group and especially lawyers in large law firms appear to be better equipped to provide insights into the choice of court process.

The part related to the choice of dispute resolution forum comprises questions 28 to 36. Respondents consider the possibility of making a choice of court decision to be very important (61%),⁷⁴⁰ but only 48% of them often choose a foreign forum.⁷⁴¹ When choosing a foreign court, respondents preferred the jurisdiction of Switzerland (19%), England (14%), France (13%), and Germany (10%), while the rest preferred other jurisdictions.⁷⁴² Respondents (38%) considered England to be the jurisdiction chosen most often.⁷⁴³ This contrast between what respondents choose and what they think is the most chosen jurisdiction can influence the choice of court behaviour, as it shows that respondents are not aware of the choice patterns of other respondents. When they consider England to be the most popular choice, they have a distorted view of the reality, which can induce respondents (as choice makers) to choose English forums as a repeated bias or conformist choice (behaviour). A conformist choice is one made in compliance with what is believed to be the most common behaviour in a society.⁷⁴⁴ It should be clear that a conformist choice is made in the event that parties do not have a determined preference. However, the Oxford survey respondents are companies, which do not always choose the court themselves; it would be interesting to see how lawyers as another class of respondents would respond to Question 32.

In Question 33, respondents were asked to rate the importance of certain factors in making a choice of court decision. For respondents, the three most important factors were 'quality of judges and courts', 'fairness of the outcome', and 'corruption'.⁷⁴⁵ If choice makers were to use these factors to make their choice of forum, the results of Questions 30, 30.1, and 30.2 would resemble the ranking of the jurisdictions in the EU Justice Scoreboard. In other words, these particular qualities so important to respondents are used to evaluate Member States in the

⁷⁴⁰ Question 28.

⁷⁴¹ Question 29.

⁷⁴² Question 31.1.

⁷⁴³ Question 32.

⁷⁴⁴ See Dwairy in conjunction with Harsanyi. Dwairy (1997) 2 and Harsanyi (1969) 529. For more on choice, see also Chapter 2.

⁷⁴⁵ This should be understood as 'lack of corruption'.

Scoreboard. Therefore, the Scoreboard ranking has to do with which Member State offers these factors comparatively better. Because respondents seek these factors, and they are offered better by Member States at the top of the Scoreboard ranking, it could be expected that answers to Questions 30, 30.1, and 30.2 would resemble the Scoreboard ranking. However, this is not the case. Low-ranking jurisdictions appear to be selected more often than those placed higher. Some (non-exclusive and non-excludable) reasons for this might be the lack of knowledge of the qualities of all/some jurisdictions, the difference in time between the survey (2008) and the establishment of the Scoreboard (2013), and the use of these factors as qualification factors. Qualification factors would mean that choice makers create qualification sets in their mind, one of which contains jurisdictions that have at least a certain level of the factors they want, and another that contains jurisdictions that do not have these factors. Once the sets are created, the jurisdictions in each are considered equally qualified to be in that set, and the factors used to characterise the set are no longer used to characterise its elements. It is noteworthy that almost the same factors considered to be the most important in choosing a forum (Question 38) are considered the most significant disadvantages of the least preferred jurisdictions (Question 40).⁷⁴⁶ The discussion will return to this reasoning in the following sections.

The Oxford survey has certain methodological flaws that need to be taken into account while interpreting its results, but it is also one of the first surveys to provide data on the choice of court in Europe, showing that Switzerland, England, Germany, and France are the jurisdictions most often chosen. Respondents considered ‘quality of judges and courts’, ‘fairness of the outcome’, and ‘[lack of] corruption’ as important factors in choosing a forum. However, considering the survey’s responses, and in light of the Scoreboard’s results seen in Section 5.1, a discrepancy can be seen. While England, Germany, and France are among the most popular jurisdictions, they are not among those ranked at the top of the Scoreboard. It can be assumed that factors other than those mentioned in the survey play a role in the choice of forum in Europe.

5.3.1.2 *French Fondation pour le droit continental – HEC Paris Survey*

In 2011, the Fondation pour le droit continental together with HEC Paris (école des Hautes Etudes Commerciales de Paris) conducted a survey on the choice of law in international contracts, and the motivations for making these choices. The authors published the survey results in a book and in a paper summary.⁷⁴⁷ The survey did not ask about choice of court preferences, however, but about

⁷⁴⁶ This is developed further in Section 5.3.4.3.

⁷⁴⁷ Durand-Barthez and Lengart (2012) and Durand-Barthez (2012). This section is based on the summary by Durand-Barthez (2012).

procedural law preferences in arbitration agreements. Some of the conclusions of the present research (as described below) point out that choice of law (procedural law) is influenced by psychological factors. The conclusion of the *Fondation-HEC* survey indicates that psychological factors should be considered when analysing the survey's responses.

Of the one hundred and twenty respondents, the majority worked as in-house lawyers in major firms. International contracts were divided into four groups: 'sales of goods, construction and similar contracts for large projects', 'mergers and acquisitions', 'financial contracts', and 'arbitration', and results were slightly different for each group. This survey is important for the conclusions that one of its authors drew in considering choice of court to be influenced by 'non-legal factors' and 'psychological factors'.

For the 'sales of goods' group of contracts, the survey's analysis suggests that in-house lawyers are mainly responsible for drafting them. Choice of law clauses are often some of the last to be discussed, and the party that insists the most on the choice of law clause often has to offer concessions on other clauses. Because this is not always desirable, parties frequently avoid hefty negotiations regarding the choice of law, which means that rather than choosing a law, lawyers prefer to avoid 'immature law'.⁷⁴⁸ Of course, in certain cases and situations, specific legal requirements are needed, which make choice of law almost obligatory. Another important factor in the choice of law is the language of the contract. Since contractual terms expressed in one language are difficult to translate into another language, parties prefer to use the law of the language in which the contract was drafted. Because English is the most used language, it plays an important role in making parties choose the law of England in their contracts. As the study's authors point out, legal considerations in choosing the applicable law are sometimes overshadowed by other factors.

In merger and acquisition contracts, external lawyers play an important role in drafting the documents and of course choosing the law clauses. Despite differences, merger and acquisitions contracts and sales of goods contracts have similarities in the choice of law modalities. As regards financial contracts, the survey revealed that these kinds of contracts are dominated by the law of common law countries. Moreover, standard forms of contracts are also common, which makes it difficult to exercise the choice of law possibility. The survey's authors point out that psychological considerations also play a role in the choice of law process in financial contracts. Important factors here might be the extended network of English law firms, the general feeling that common law is better

⁷⁴⁸ Durand-Barthez (2012) 509.

equipped for these kinds of contracts, and the role of English as the contractual language. As the authors point out, non-legal considerations seem to play a role in the choice of procedural law of arbitration agreements as well, and include location of the city, the perceived neutrality of a jurisdiction, or the intention of granting a concession as a trade-off against an unconnected advantage.

Clearly, the HEC survey was focused more on the choice of law issue. However, making a choice of procedural law or choice of court would follow the same path as the choice of law, and would face the same problems. An important factor highlighted by the survey's authors is the presence of psychological and extra-legal considerations. These considerations are difficult to predict and to measure, which makes them difficult to mitigate. Jurisdictions seeking to attract law users or court users should also address the psychological and extra-legal considerations that influence choice makers.

5.3.1.3 British Institute of International and Comparative Law survey

In 2014, the British Institute of International and Comparative Law (BIICL), with the support of the Ministry of Justice of the UK, conducted an empirical study to improve the Ministry's understanding of the reasons that parties make certain choice of law and choice of court decisions.⁷⁴⁹ The aim of the study was to gain an understanding of litigants' and professionals' experience with the English legal system, with a particular focus on the factors that influence decision makers to choose English courts and English law. In the years prior to the BIICL study, the Ministry of Justice had been trying to design and to implement some reforms related to the justice system.⁷⁵⁰ The study consisted of semi-structured interviews with individuals active in the field of international commercial litigation, a web-based survey, and a forum debate with experts.

One hundred and sixty-one people responded to the survey, which was one of the components of the empirical study together with the interviews. However, the authors had distributed the survey throughout their network without any sample or population delineation, and because of the problems related to this approach, the authors considered the study to be only a reflection or personal perspective of the 215 persons who were surveyed or interviewed. This caveat should discourage any attempt to generalise conclusions based on this study. Most of the respondents

⁷⁴⁹ Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants, and Jose Del Rio, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts' (London 15 January 2015) Ministry of Justice Analytical Series <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf> accessed 22 December 2017.

⁷⁵⁰ See Section 5.2.2.

were lawyers (43%), while the rest were working in academia, in companies, in the judiciary, and so forth. Geographically, the respondents were located mainly in the UK (51%) and the EU (32%), with the remainder located as far away as Canada, Peru, Albania, Hong Kong, and Australia. Professionally, two-thirds of the respondents had had at least one experience with English courts in the previous five years, while one-third of the total had litigated more than once in English courts in the same period. Most of the respondents had been involved in commercial claims (88%), while claims exceeding £1,000,000 constituted more than 60% of their work. For half of the respondents, cross-border cases had composed more than 60% of the cases they had dealt with in the previous five years.

Despite the survey's methodological flaws, its results provided some insights into respondents' choice of court behaviour. Respondents considered several influencing factors with respect to choosing English courts. As mentioned in the report, the top two factors were 'reputation/experience of judges', and 'the combination of choice of court clauses with choice of law clauses in favour of English law'.⁷⁵¹ Other important factors included efficient remedies, procedural effectiveness, and neutrality of the forum, market practice, the English language, effective UK-based counsel, and speed and enforceability of judgments in foreign jurisdictions. Other supplementary factors included quick interim relief, neutrality, fairness and transparency of the judicial system, disclosure regime, absence of jury trials, absence of punitive damages, and excellent infrastructure and professional support. On the negative side, factors that discouraged litigants from choosing English courts were the high costs of solicitors and barristers, the 'cumbersome' nature of the adversarial system, costs of disclosure, and judicial proceedings not being streamlined. Respondents were also asked about which courts they considered to be competitors to English courts. On the basis of the responses, the biggest competitors were New York, Singapore, and other EU Member States. Other EU Member States were considered a separate category, which offered an inquisitorial system, better cost control, and quicker results.

This survey's results provide little information about to which EU jurisdiction the respondents would consider submitting their cases. More interesting statements have to do with the factors influencing respondents in their choice of English courts; some of these are extra-legal (reputation, market practice, English language, effective UK-based counsel), others are almost non-legal factors (combination of choice of law and choice of court, neutrality of the forum), while the remaining factors have more to do with perceived benefits of the English procedure. Among these benefits, respondents cited procedural effectiveness,

⁷⁵¹ Lein (2015) 15.

speed, and excellent infrastructure. As was suggested by the HEC survey, non-legal factors play an important role in the choice of court process, although their weight and their exact role cannot be distinguished in this study. In terms of quantity, extra-legal factors are almost half of the top factors mentioned by the BIICL survey respondents. A common suggestion that stems from both the HEC and the BIICL survey is that more studies are needed to understand the weight and the role of extra-legal factors in influencing those who decide on choice of court.

5.3.2 Aim of the survey

The aim of research is to provide a better understanding of the civil justice system competition in the European Union. Competition of jurisdictions is inherently connected with choice preferences, and with the habit patterns of choice makers. Chapter 2 provides a short overview of, among others, competition of jurisdictions for incorporations, competition in tax law, competition in labour law, and competition in environmental law. Quite often these studies include empirical research to back up or test theoretical analysis.⁷⁵² Empirical evidence contributes with facts about the distribution of choices and elements that influence choice. Surveys on the civil justice system competition, described in Section 5.3.1.1 to 5.3.1.3, contribute to the theoretical discussion. Vogenauer, using data from the Oxford survey, argues that the civil justice system competition does not exist.⁷⁵³ Based on data from the HEC survey, Durand-Barthez suggests that choice of law is influenced by psychological rather than legal factors.⁷⁵⁴ The report of the BIICL survey contradicts the findings of Vogenauer by concluding that English courts are in competition with other courts. Another finding from the BIICL survey concurs with Durand-Barthez's suggestion that choice makers are influenced by psychological or extra-legal factors. In line with the aforementioned studies, the present research is based on the need to enrich the theoretical part with data on choice of court in the EU.

Thus, the general aim of this empirical research is to contribute to the theoretical analysis developed in Chapter 4, which analysed the market for civil justice systems in the EU along with the different elements that compose it. Among the

⁷⁵² Kessler and Rubinfeld on civil justice systems: Kessler and Rubinfeld (2007); Eisenberg and Miller on choice of law and choice of forum in the US: Eisenberg and Miller (2009); Ringe on company law: Ringe (2013); Geys and Osterloh on company incorporation: Geys and Osterloh (2011); Baskaran and Lopes da Fonseca on tax competition: Baskaran and Lopes da Fonseca (2014); Moser on international sales contracts: Moser (2015); Sanga on choice of law: Sanga (2013); Cuniberti on choice of law in arbitration agreements: Cuniberti (2014).

⁷⁵³ Vogenauer (2013).

⁷⁵⁴ Durand-Barthez (2012) 510.

analysed elements was its demand side, which consists of natural and legal persons who want to resolve a civil conflict in the courts of a Member State. In addition to natural and legal persons, lawyers play an important role in the choice making process, and, as such, they contribute a great deal to the output of the demand side.

The main aim of this empirical research is to collect more data on choice of court preferences by lawyers. As previously mentioned, lawyers have been subjects of empirical research only incidentally, while the theory developed in Chapter 4 considers them to be the driving force behind the demand side. More data on lawyers' preferences regarding choice of court would lead to a better understanding of the demand side's preferences. On the basis of the analysis in Chapter 4, it appears that lawyers would be interested in choosing their own jurisdiction. In situations in which lawyers cannot choose their own jurisdiction, they would be interested in choosing a jurisdiction that is near their location, has noncomplex procedures, and is accurate and fast. Therefore, data on lawyers' court preferences would contribute to a better understanding of the theoretical analysis, and possibly support it with empirical evidence. Another aim of this empirical research is to collect data on factors that lawyers consider important when making a choice of court. Data on legal factors or psychological factors would provide helpful insights into the theoretical discourse. A third aim of this research is to collect data on who lawyers think makes the choice of court in a lawyer-client relationship. Research so far has been focused on asking legal or natural persons about their choice of court preferences, with lawyers appearing only incidentally as respondents in those surveys. However, in Section 4.3, it was suggested that lawyers dominate the lawyer-client relationship and are also the party responsible for making the choice of court. A better understanding of this would allow researchers to adjust their focus and competing governments to adjust their promotion strategies. A final aim of this empirical research is to confront lawyers' preferences of jurisdiction along with the factors considered important by lawyers with the results of the Scoreboard from Section 5.1. Confronting these preferences will test for any inconsistency in choice making.

5.3.3 Methodology

The theoretical analysis in Chapter 4 concluded that the demand side of the civil justice system market is created by individuals and companies mobile enough to move between jurisdictions in order to resolve their conflicts. Mobile individuals and companies are those that have at least financial resources to sustain costs related to mobility. In other words, these individuals and companies tend to be wealthy. Chapter 4 concluded that the client-lawyer relationship is dominated by the lawyer, without prejudice to the characteristics of the client or the lawyer. As a result, lawyers in large law firms can be considered as the actors that effectively

make the choice of court decision. Based on these conclusions, the obvious target population for this empirical research is lawyers working in large law firms with a seat in the EU, which is the geographic limit of this study.

To better identify the target population, I used the list of the top one hundred law firms in the world in terms of revenue.⁷⁵⁵ Published by *The American Lawyer* journal in October 2014,⁷⁵⁶ it consists mainly of American and British law firms with offices in many jurisdictions. Using the websites of these law firms, I drew up a list of lawyers working for them in the EU. It was not possible to collect this information from all the websites, thus some law firms in the list did not receive the survey. However, these international law firms are not necessarily the biggest in each European jurisdiction. To compensate for this, I used the list of the top one hundred continental European law firms in terms of revenue.⁷⁵⁷ This list was published by *The Lawyer* in 2014.⁷⁵⁸ I also made a list of all the lawyers working in the EU, but again faced some difficulties in accessing information on some of the law firms. In total, however, I collected contact details of 27,303 lawyers. I could not create a list only of lawyers qualified or experienced in cross-border choice of court, because I was unable to access the personal information for every lawyer, but I assumed that non-experienced or non-qualified lawyers would not participate in the study. Moreover, I was unable to filter lawyers based on the department/section in which they were working, because many of them have past experience with cross-border choice of court or other experience related to the choice of court. It was also clear that most of the respondents would have choice of court experience in transactions and contracts rather than direct litigation experience.

Considering the size of the target population, their distribution, and the resources available to me, I considered a survey was the best method of getting feedback from the basic units of the legal population. The survey contains several questions reflecting the above-mentioned aims of the empirical research, and there are four research questions related to as many hypotheses. The first question – ‘Which jurisdiction in the EU do lawyers prefer to litigate in?’ – is related to the hypothesis that lawyers are interested in choosing a jurisdiction that is near their location. This means that they prefer to choose either their own or a neighbouring jurisdiction. The second question – ‘Which elements do lawyers consider

⁷⁵⁵ Annex: List of law firms included in the study.

⁷⁵⁶ *The American Lawyer* (2014) 104.

⁷⁵⁷ Annex: List of law firms included in the study.

⁷⁵⁸ *The Lawyer* publishes an annual report on the top one hundred law firms in Europe. The latest issue for 2016 can be accessed at <<http://reports.thelawyer.com/reports/european-100-2016>> accessed 22 December 2017.

important when making a choice of court decision?’ – is related to the hypothesis that lawyers use non-legal factors to make a choice of court decision. The third question – ‘In the relation lawyer-client, who makes the choice of court decision?’ – is related to the hypothesis that lawyers dominate the lawyer-client relationship, and as a result are the driving force behind the demand side’s output. The fourth question – ‘Do lawyers make a consistent choice of court decision?’ – is related to the hypothesis of the second question. One set of questions asks respondents to mention, in general, the characteristics they consider most important when making a choice of court decision. Another set asks respondents to indicate the jurisdiction they choose most often, and to state its best characteristics. A consistent choice would be one in which the characteristics considered important in general by the choice maker are the same as the characteristics of the particular choice he/she makes.

In designing the survey, I made extensive use of the academic literature on empirical research.⁷⁵⁹ Before distributing the survey, I consulted with researchers from the Erasmus School of Law, who specialised in empirical studies and in choice of law and choice of forum, and who had experience as lawyers. I owe these people a large debt of gratitude.⁷⁶⁰ Pilots were conducted to test the time required to complete the questionnaire and to make sure the questions were clear. The survey was divided into four parts,⁷⁶¹ the first containing only questions about the personal characteristics of the respondents, and its intention was to identify their professional and educational development. Professional experience, professional specialisation, and academic education are all elements that shape the respondent’s world view and therefore his/her choice of court behaviour. The second part contains questions related to the jurisdiction preferences of the respondents as well as the factors considered important when making a choice of court. The third part contains questions related to the perception of the competition of civil justice systems in the EU. The fourth and last part contains the final remarks.

The survey was prepared using the SurveyMonkey Website, and was organised in seven pages to facilitate online access. Results show that a number of respondents dropped out after each page. I decided to distribute the survey via email using the SendGrid website, which allows for mass email campaigns

⁷⁵⁹ Allassutari, Bickman, and Brannen (2008); Gideon (2012); Bryman (2015); Saris and Gallhofer (2014); Stoop, Billiet, Koch, and Fitzgerald (2010).

⁷⁶⁰ For their help, I would like to thank Prof. Xandra Kramer, Dr. Willem-Jan Verhoeven, Dr. Pieter Desmet, Prof. Martijn Scheltema, Lisa van Reemst, Jing Hiah, and Prof. Frank Smeele.

⁷⁶¹ Annex: Survey Questionnaire.

without compromising the reputation of the sending IP address or email account. I prepared an email introducing the survey and inviting the recipient to take part. A customised link was included in the body of the email,⁷⁶² and redirected the viewer back to the SurveyMonkey-hosted questionnaire. Before starting the questionnaire, the respondent was presented with a description of the research and a banner of the Erasmus School of Law of the Erasmus University Rotterdam. Respondents were assured with regard to their privacy and the confidentiality of their responses. The questionnaire was distributed for the first time on 27 October 2015, and two reminders were sent to the target population at intervals of 14 and 15 days, respectively (10 November 2015 and 25 November 2015). These intervals made it possible to send the survey on different days of the week, and to avoid days when some recipients might not be at work or had recurrent busy schedules. More than three reminders would have resulted in technical difficulties, as email servers would have begun to categorise the reminder emails as spam and sent them to the recipients' junk folder.

On 27 October 2015, the questionnaire was sent to 27,095 (100%) email addresses, while 208 of 27,303 email addresses were considered invalid by SendGrid.⁷⁶³ Of the sent emails, 362 were bounced back by the recipients' servers, and thus were not delivered. In total, 24,370 (89.94%) emails were delivered, and 480 (1.97%) of the recipients clicked the incorporated link. From October 27 to November 9, there were 275 responses to the survey, of which 174 were complete. The second reminder was sent on 10 November 2015 to 26,578 (100%) email addresses.⁷⁶⁴ The email was delivered to 23,743 (89.33%) addresses; 5855 (24.66%) of the recipients opened the email, and 285 (1.2%) of them clicked the incorporated link. From November 10 to November 24, there were 166 responses to the survey, of which 102 were complete. The third and final reminder was sent on 25 November 2015 to 26,458 (100%) email addresses. The email was delivered to 23,984 (90.65%) addresses; 5643 (23.52%) of the recipients opened the email, and 185 (0.77%) of the recipients clicked the incorporated link. From November 25 until 27 October 2016, when the link was disabled, there were 88 responses to the survey, of which 54 were complete. In total, there were 529 respondents, of which 330 completed the entire survey.

⁷⁶² The link to the survey was <<https://www.surveymonkey.com/r/choice-of-court>>, and was available until 27 October 2016. Recipients of the link could submit their responses up to and including the last day.

⁷⁶³ This happened either because the recipients were no longer working at those law firms or because the email was presented in a wrong format on the law firm's website from which it was copied.

⁷⁶⁴ Unsubscribed, invalid, and email servers that risked blacklisting my sending IP were removed.

Given that the initial target population was 27,303 and the response rate was 529 (330 complete questionnaires), the survey's response rate was 1.93% (1.2% complete questionnaires).⁷⁶⁵ However, some persons in the target population did not receive the email. Considering only the email addresses that received the invitation email (24,370), the response rate was 2.17%. However, as was reported by SendGrid, not all the email recipients opened the email, and only some of them clicked the provided link. Because SendGrid is used primarily to send marketing emails, the email inviting some of the recipients was marked as **MARKETING**. Because of this, chances are high that these recipients did not open the email. Furthermore, it can be argued that some of the recipients did not have the necessary experience and knowledge to participate in the survey. This was a direct result of the way the target population was framed, which included not only eligible elements but also over-covered non-eligible elements. Supposing that only the eligible elements opened the email, these would have amounted to 17,624 unique clicks (including data from the reminders as well). Considering these figures, the response rate would be 3% (1.87% completed questionnaires only). Following the same reasoning, it can be argued that only those who clicked the link provided in the email had the necessary experience and knowledge to be eligible respondents. If only unique clicks are considered, the response rate was 55.7% (36.8% completed surveys only) based on 950 unique clicks (this includes data from the reminders as well).

Apart from the response rate, non-responses deserve some attention.⁷⁶⁶ Anecdotal evidence suggests that some of the email recipients did not participate in the survey because they did not have time. Lawyers tend to have busy schedules, and time for them is often at a premium. I received anecdotal evidence in support of this in an email from a recipient asking me to extend the response deadline because of her busy schedule. Furthermore, other anecdotal evidence suggests that some lawyers constantly receive invitations to participate in surveys, which can explain their aversion to such emails. However, it is heart-warming that the majority of the respondents were partners or senior associates, which demonstrates that experienced respondents were more willing to participate. Finally, it should be remembered that response rates to surveys have decreased over the years, and email surveys have lower response rates compared to other types.⁷⁶⁷

⁷⁶⁵ Scholars do not agree on how to define a response rate. Bethlehem considers it to be equal to the number of responses over the number of eligible elements. See Bethlehem (2009) 212-218. Similar definitions are also provided by Bautista (2012) 43 and Hibbers, Johnson, and Hudson (2012) 54.

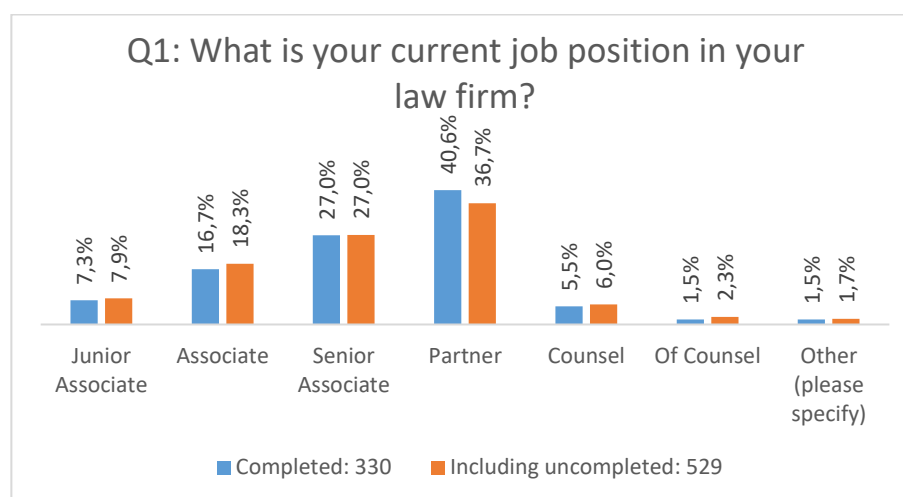
⁷⁶⁶ On how to improve response rate, see Manzo and Burke (2012) 327.

⁷⁶⁷ Hibbers, Johnson, and Hudson (2012) 73.

The questionnaire contained twenty-seven questions. Five of them were open, and respondents were to write what they considered appropriate; seven offered the possibility of multiple answers; two offered a matrix of answers; and the rest offered a choice of only one answer. Almost all of the questions provided space for comments. It was not possible to skip a question, but respondents could complete and send the survey – even unfinished – at any time.

5.3.4 Analysis and findings

This section provides an analysis of the survey and presents the main findings. The analysis is divided into three parts: the first discusses respondents' demographics; the second discusses choice of court preferences; and the third discusses respondents' opinion of civil justice systems in the EU.

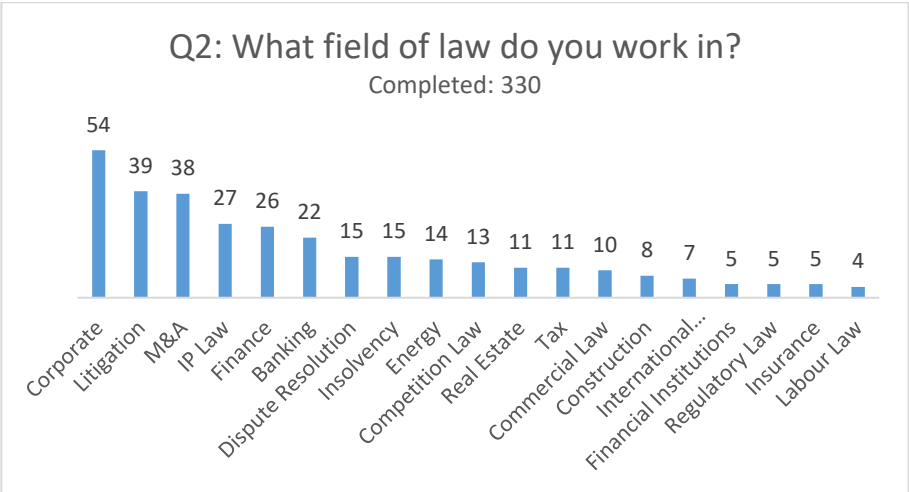


5.3.4.1 Respondent demographics

The first part of the questionnaire is a set of questions aimed at collecting data on respondents' professional and academic qualifications. Question 1 asked respondents to determine their position in the structure of their law firm. They could choose between 'Junior Associate', 'Associate', 'Senior Associate', 'Partner', 'Counsel', 'Of Counsel', and 'Other'. Because these options were not described, respondents could self-assess their position, as positions among law firms vary in name and description. However, it is considered important for two reasons. First, respondents high in the hierarchy of the law firm are more likely to influence the behaviour and the choice preferences of that law firm or of the team they are leading. In a certain way, they represent a group larger than their own. Second, respondents placed in the hierarchy of a law firm are expected to have extensive work experience. This increases their likelihood of being familiar with

more than one jurisdiction, and the possibility of having more experience with choice of court clauses.

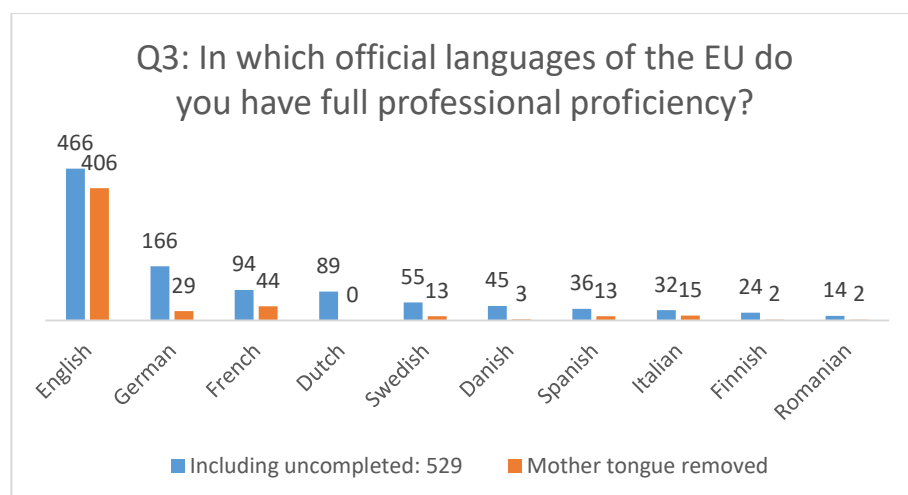
Partners and Senior Associates composed the vast majority of the respondents with 40.6% and 27%, respectively. The figures could be slightly higher if responses from ‘Other’ are considered. In ‘Other,’ some of the respondents specified that they were ‘Salaried partners’ or ‘Associated partners’. Considering also the responses of uncompleted surveys, the share of ‘Partners’ and ‘Senior associates’ declines, which shows that these two groups were more interested, and perhaps qualified to finish the survey.⁷⁶⁸ This can be an indication that the topic of the survey in particular and the research in general is considered important by more senior lawyers.



Question 2 was open, and asked respondents to name the field of law in which they were specialised. The five legal specialities most mentioned were ‘corporate law’, ‘litigation’, ‘mergers and acquisitions’, ‘intellectual property law’, and ‘finance’. Each of these fields involves a great deal of cross-border transaction and litigation. Despite the fact that some lawyers do not work in a law firm’s litigation department, they are often involved in making a choice of court either by advising a client or by drafting a choice of court clause in a contract. For a better perspective, it should be mentioned that lawyers in certain fields of law work with model contracts, which provide a choice of court clause. Amending or

⁷⁶⁸ Including unfinished questionnaires, there were 529 responses. The first question was answered by all the participants. Junior Associate 7.94% (42); Associate 18.34% (97), Senior Associate 27.03% (143), Partner 36.67% (194), Counsel 6.05% (32), Of Counsel 2.27% (12), Other (please specify) 1.70% (9).

changing these model clauses is not very frequent, which implies that transaction lawyers might not have as much experience as they have.

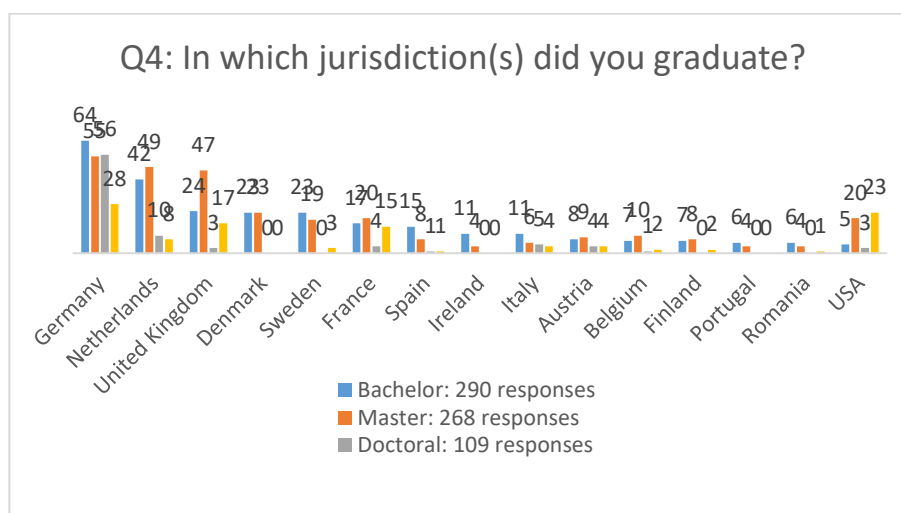


As was mentioned in the results of the HEC and the BIICL survey, language plays an important role in choosing a court. With English being almost the lingua franca used in drafting international contracts, parties may choose English courts to better litigate in the language of the contract and to save translation and administration costs. Lack of language abilities can also influence choice of court options for parties, leading them to choose only courts that use a language with which they are familiar. Question 3 aims at collecting data on respondents' language abilities. Respondents were asked to mention all the official languages of the EU in which they had full professional proficiency. Respondents could choose more than one language, but did not have the possibility of mentioning their mother tongue. Data from the survey show that a large majority of the respondents were proficient in English.

The other most known languages were German, French, Dutch, Swedish, Danish, and Spanish. Considering that many respondents included their mother tongue in their responses, unrefined data from Question 3 should be viewed with caution. Unrefined data do not give a good idea of the ability of lawyers to speak a language other than their mother tongue. However, this can be corrected. Assuming that the respondents' mother tongue is the language of the jurisdiction in which they mainly operate (asked in Question 5), it is possible to calculate the extent to which each language is popular outside its borders.⁷⁶⁹ Results show that

⁷⁶⁹ The problem is that for some jurisdictions it is difficult to make this assumption. For example, in Belgium, the official languages are Dutch and French, so a respondent's mother

while figures decline for all the languages, English figures decline least, and French declines less than German, to become the second most widely used language. These results show that English remains the best known language, with the potential to become the only language to be used in cross-border transactions. Three possible consequences may derive from this. First, English is and will remain the communication and legal language for cross-border lawyers. Second, the use of English might create a bridgehead for an invasion of English legal terms – or perhaps that bridgehead already exists. Third, using the English language and possibly English legal terminology increases the pressure to choose an English court.

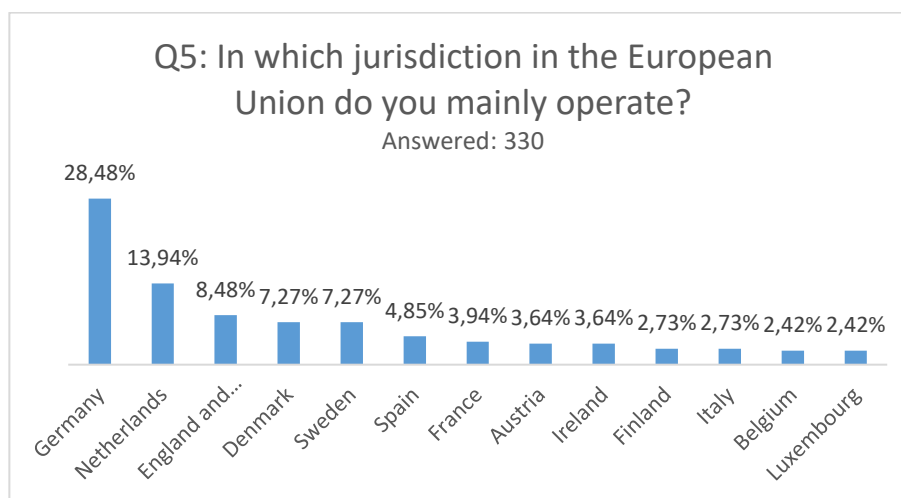


Cuniberti, in a study on the choice of law in Asian international contracts, suggests that it is influenced by the place where the respondent was educated.⁷⁷⁰ If this is true for the choice of law, it can also be true for the choice of court. Question 4 aims at collecting data on the respondents' bachelor, master, doctoral, and other kinds of education. Respondents were asked to name the jurisdiction where they had graduated, by writing down their input in an open field. For this question, it cannot be assumed that a lawyer working mainly in a given jurisdiction had graduated there, although it can be expected that the two are related. Results show

tongue can be one of the two; in Luxembourg, the official languages are Luxembourgish, German, and French; in Wales, the official languages are Welsh and English. Taking these problems into account, it was assumed that for half of the Belgian respondents, the mother tongue was Dutch, and for the other half, it was French. For respondents from Luxembourg, the mother tongue was assumed to be French. For respondents from the United Kingdom and Ireland, English was assumed to be their mother tongue. German was assumed to be the mother tongue for German and Austrian respondents.

⁷⁷⁰ Cuniberti (2016) 76-79, 86.

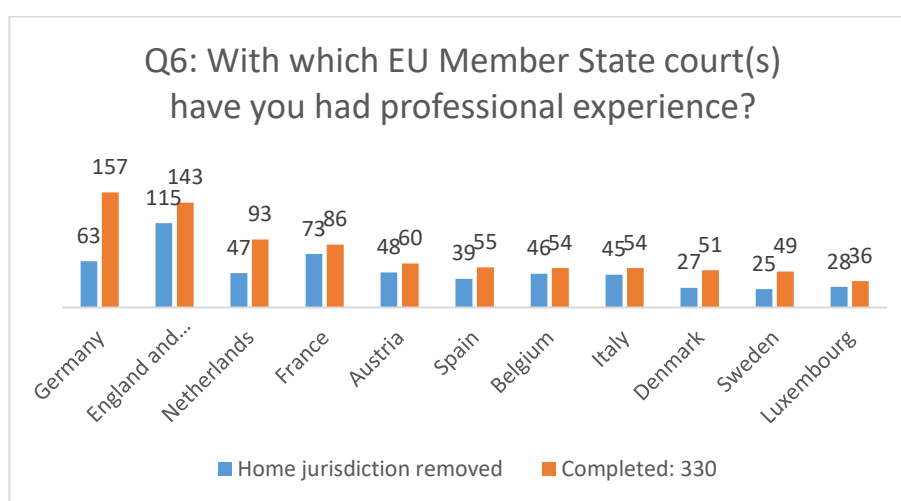
that the majority of the respondents had graduated in Germany, followed by the Netherlands and the UK.⁷⁷¹ However, the Netherlands, the UK, and the US show an increase in the number of master graduates compared to bachelor graduates. This can be explained by the quality of the education provided in Dutch, British, or American universities, but it can also be explained by the choice of law and choice of court. Given that English law is considered to be the law most chosen in the EU, law firms view British legal education as an asset in terms of their lawyers.



Question 5 asked respondents to name the jurisdiction where they mainly operate, meaning the location where they conduct most of their work as lawyers. The aim of Question 5 is to collect data that can be used to better determine respondents' demography and to enhance understanding of responses to the other questions. It is obvious that the location is not equal to the nationality. Data show that the majority of the respondents conduct their professional activity in Germany (28.48%), the Netherlands (13.94%), England and Wales (8.48%), Denmark (7.28%), and Sweden (7.28%). It is interesting to note the high number of respondents located in the Netherlands, which cannot be explained by the number of Dutch lawyers in general. The high number of respondents should be taken into account when analysing some of the responses. A possible reason for the relatively large number of Dutch lawyers is my affiliation with the Erasmus University Rotterdam and my use of the Erasmus School of Law's logo on the Introduction to the survey. If this is true, future studies can use endorsements from local universities and their logos to increase the response rates from particular jurisdictions.

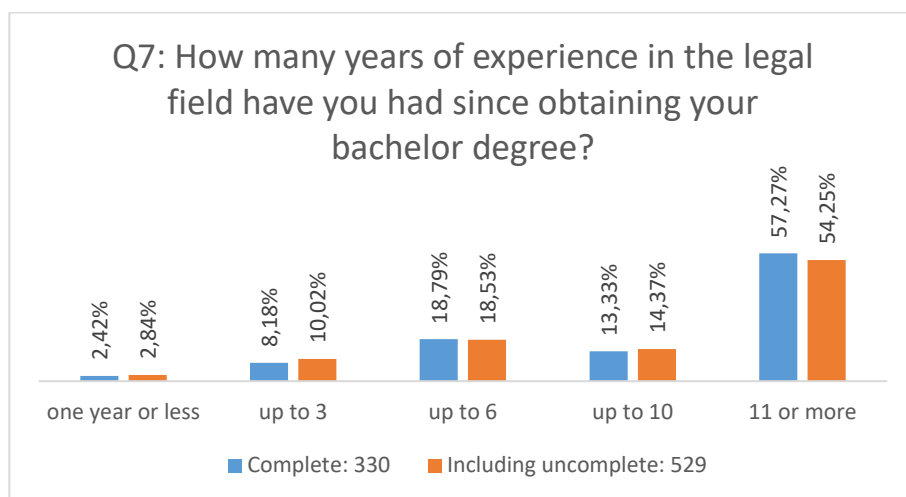
⁷⁷¹ Here the UK includes England, Wales, and Scotland.

Question 6 asked respondents to name jurisdictions in the EU where they had had professional experience. Respondents could choose more than one jurisdiction, but professional experience was not defined. Respondents used their own assessment to consider one or more experiences relevant to this question, and were able to mention other jurisdictions in the comments box. Experience in more than one jurisdiction improves knowledge with regard to their courts, and facilitates lawyers' mobility. Lack of mobility would be to the detriment of the civil justice system competition. One of the aims of Question 6 was also to collect data on the most familiar jurisdiction. Regardless of how good a jurisdiction is, if lawyers or litigants are not familiar with it, chances are slim that it will be chosen.



Question 6 data shows that most of the respondents had experience with Germany, England, the Netherlands, and France. However, controlling responses for the home jurisdiction of the respondents highlights another perspective. It shows that most of the respondents have had experience with England, France, Germany, the Netherlands, and Austria. As regards jurisdictions outside of the EU, respondents mentioned experiences in the US, Canada, Singapore, Russia, Switzerland, and so forth. Considering all the answers (excluding comments), respondents have had professional experience with 1066 courts, which means that on average one respondent has had professional experience with 3.23 courts. Considering the Question 6 results, it can be said that almost all the respondents have had experience with courts regardless of the department in which they worked. On average, every respondent was familiar with somewhat more than three jurisdictions. The bad news for the civil justice system competition is that even a group of relatively experienced lawyers like the respondents to this survey have had experience with only an average of three jurisdictions. Law firms can compensate this by creating teams of lawyers with different experience or share knowledge with law firms in other jurisdictions. This increases the chances that

the choice of court is made only between the limited number of jurisdictions known to the lawyer, while at the same time other jurisdictions with potential benefits for the case are disregarded.

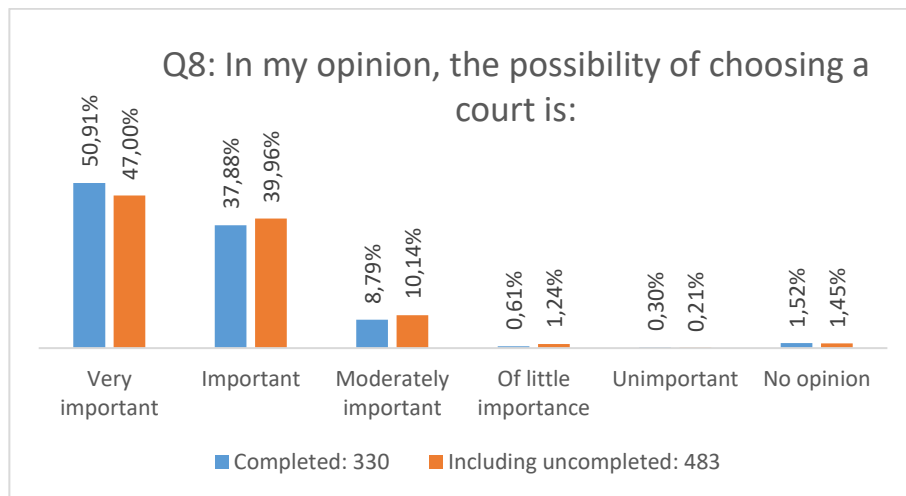


Question 7, the final question in the demographic section, asked respondents how many years of experience they had had in the legal field. The majority of them had 11 or more years, which confirms the conclusion from Question 1 that respondents were mostly experienced lawyers. Not only this, but experienced lawyers were also more inclined to complete the survey, while the rate of uncompleted surveys was higher among less experienced respondents. Experience is an important factor in the choice of court process, thus the opinion of experienced lawyers is invaluable input for the survey data.

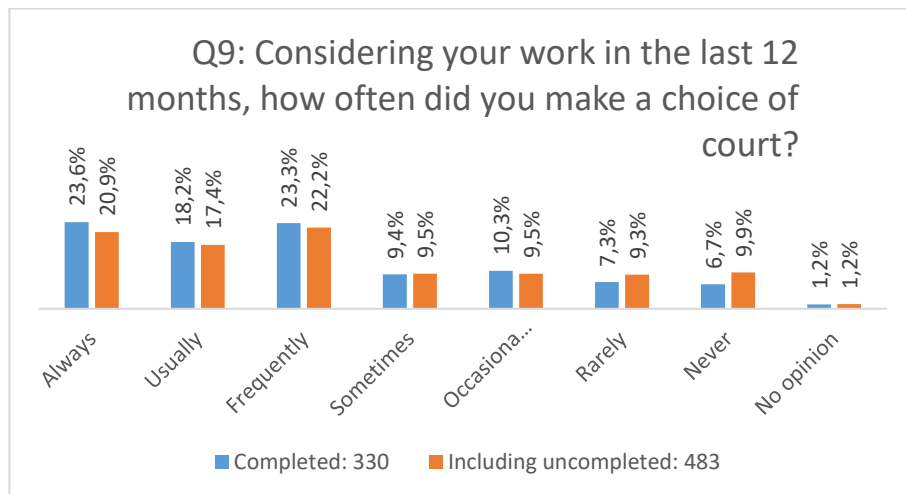
5.3.4.2 Choice of court in the EU

Part 2 of the survey covers questions related to the choice of court preferences and to opinions of the respondents. In Question 8, respondents were asked how important they considered choice of court be. Results show that 88.8% of the respondents considered the possibility of choosing a court important or very important.⁷⁷² Some respondents commented that '[choice] opens strategic options for the client', or '[choice] will oftentimes determine the further course of the litigation and thus has a significant impact on prospects of success', or '[choice] enables contract parties to make their agreement tailor-made and take into

⁷⁷² Results including uncompleted surveys give almost the same result, despite the demographic differences. This is an indication that being able to choose a court is appreciated by non-experienced, low-ranking lawyers.

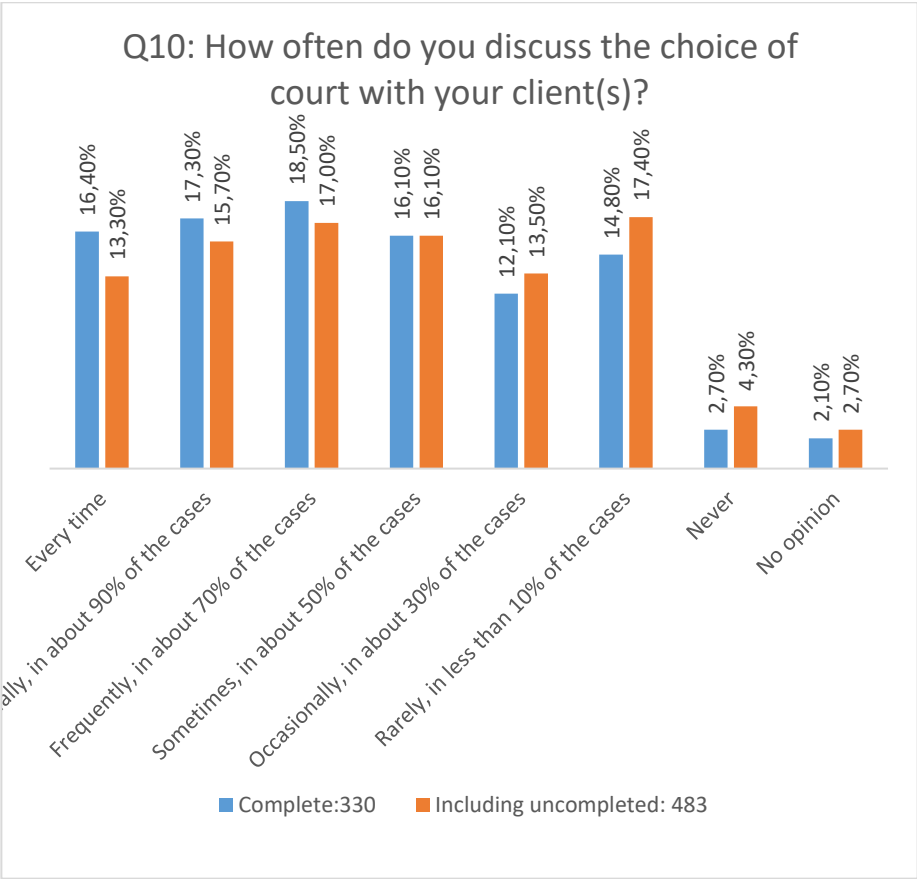


account the specific rules of a jurisdiction that they both prefer'. Other comments indicated that the possibility of choosing for arbitration was also important, and sometimes more important than choosing a court. The comments show that respondents considered choice of court a useful tool that can could the outcome of the litigation. Results of this question are in line with those of the Oxford survey, where 61% of the respondents considered choice of dispute resolution forum to be very important.



Question 9 asked respondents how often they had made a choice of court in the previous 12 months. More than half (65.1%) stated they had made a choice of court at least frequently. While frequently was not defined, the scale in the survey implies that these options included frequencies of more than half of the cases they had dealt with. Some respondents commented that while they had chosen frequently, it was for arbitration rather than for a court. Other comments

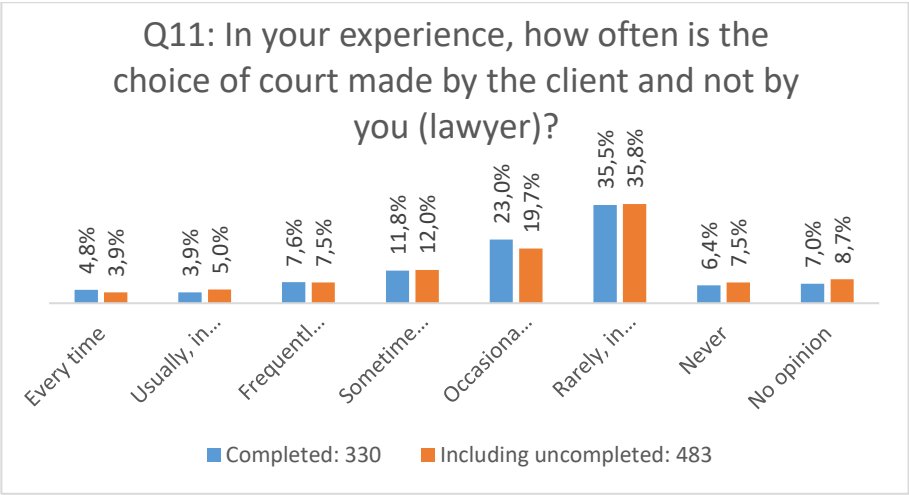
emphasised that in certain situations respondents were not able to make a choice of court, either because the choice had already been made, or they did not have the legal possibility of making it, or it was the competence of their colleagues. These data show that for lawyers working in large international law firms, choosing the court is a very common practice.



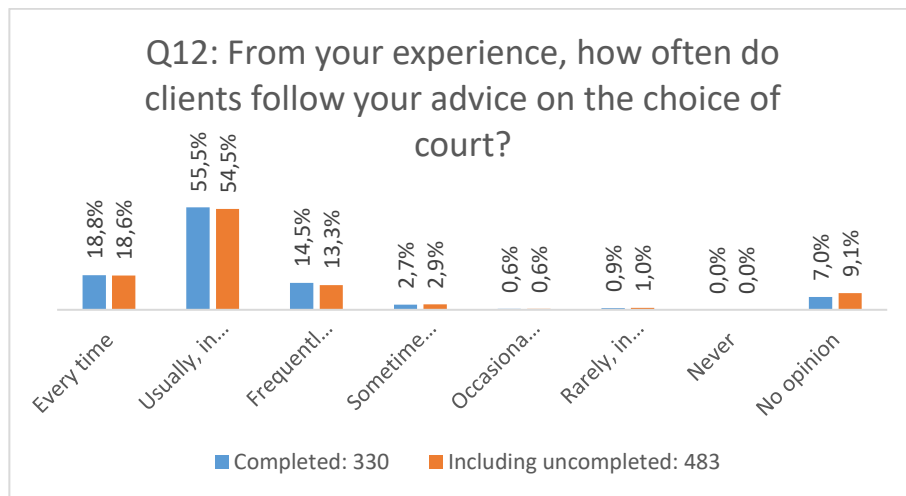
One of the conclusions of Chapter 4 is that lawyers dominate their clients and make decisions autonomously. It is expected that lawyers take the lead and decide on their own, or clients let lawyers decide what court to choose. Question 10 asked respondents to show how often they discussed choice of court with their client(s). Results show that 45.7% of the respondents discussed choice of court with their clients in about 50% or less of the cases, and the remaining respondents discussed the matter with their clients more often. If responses from incomplete surveys are taken into account, the rate of respondents that discuss choice of court with their clients in about 50% or less of the cases clients increases to 51.3%. This increase can be an indication that senior lawyers handle more delicate cases that need to

be discussed with their client. However, this data do not show who really makes the decision.

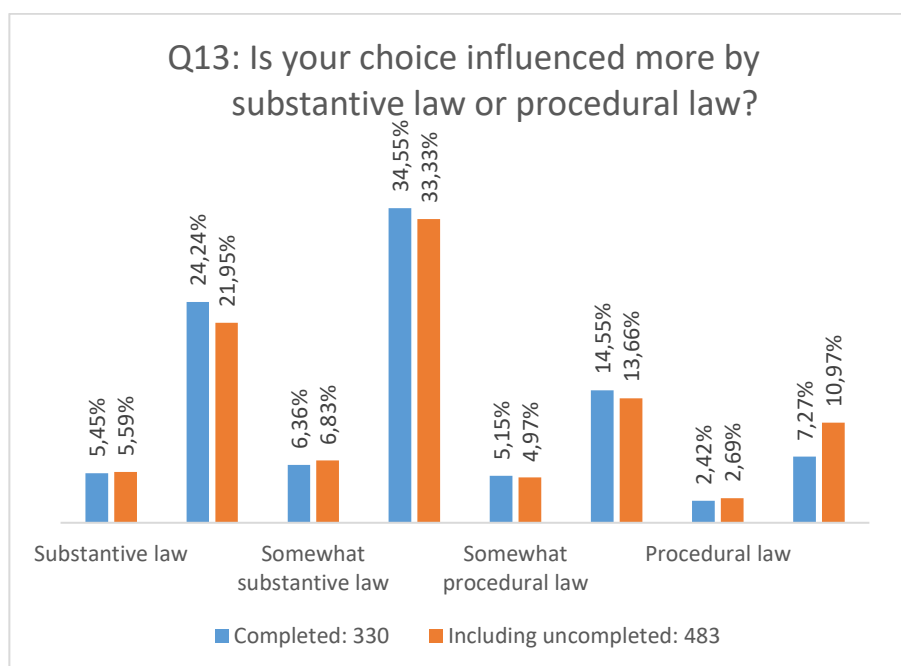
On this issue, Question 11 asked respondents to indicate how often choice of court is made by the client and not by the lawyers. Of the respondents, 28.1% consider that clients make the choice of court decision in 50% or more of the cases. Almost the same result (28.4%) is obtained if uncompleted surveys are considered.⁷⁷³ Data from questions 10 and 11 show that while lawyers discuss with their clients choice of court options, the decision is left in hands of the lawyers or the lawyer makes the final decision. While the results do not prove lawyers' domination in the relationship with their client, it provides data that support this theory, and show that lawyers are actually the real choice makers.



⁷⁷³ On the other end of the scale, 41.9% of the lawyers consider that clients make the choice in 10% or less of the cases. Or 64.9% of the respondents think that clients make the choice in 30% or less of the cases.



In addition, Question 12 asked respondents to indicate how often clients followed their advice on choice of court. The vast majority of the respondents (88.8%) consider that clients follow their lawyer's advice. These data add further support to the idea that the lawyer is dominant in the client-lawyer relationship. Commenting on Question 11, a respondent stated that clients make the choice of court 'but always having received (and nearly always having acted in accordance with) our advice on the question'. Another respondent also pointed to an interesting situation where the lawyer proposes two or more jurisdictions, and the clients decide between them. Hence, in this situation both the lawyer and the client feel they made the choice. Nevertheless, it can be argued that even in this situation the choice is made by the lawyer, who presents the options. Given that for the lawyer all the options are equally good, the client has the privilege of choosing from among them. Another respondent's comment that best summarises this discussion was 'they [clients] think I am an expert'. It is this image of expertise that places lawyers in their dominating position.

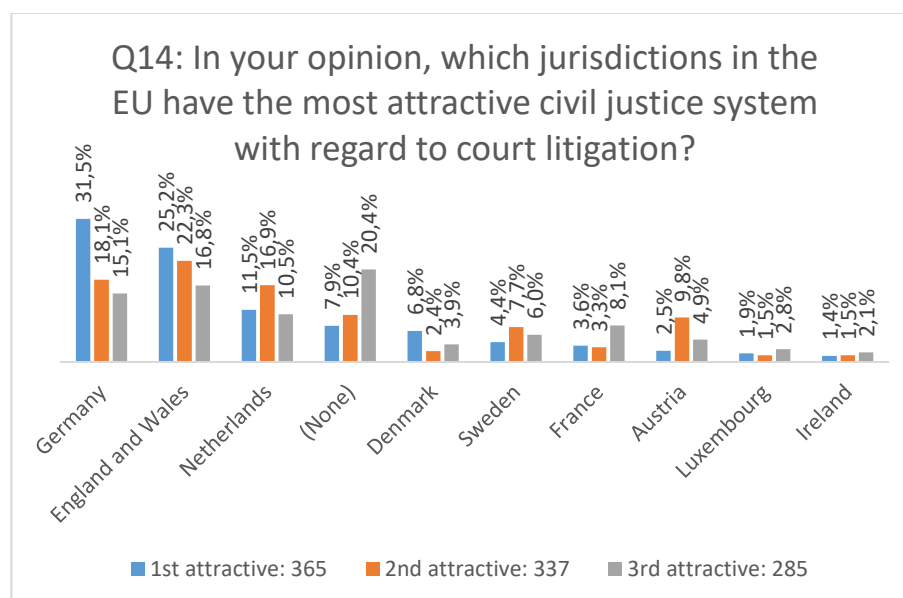


A comment in Question 8 stated that choice of court is important ‘to assure synchronisation with applicable law in contacts’, and reflects a common practice of matching the applicable law with the court of that jurisdiction. In other words, procedural law becomes a function of substantive law.⁷⁷⁴ Question 13 asked respondents to indicate whether substantive law or procedural law had a greater influence on their choice of court. Data show that the majority of the lawyers (34.55%) consider both laws important. However, the percentage of lawyers that consider substantive law to any degree is bigger compared to those that consider procedural law at any extent. These data, however, provide no definitive answer. In this regard, anecdotal evidence suggests that the results of this questions might be influenced by the percentage of lawyers experienced in litigation or in transactions. Many respondents commented that choice of court was influenced primarily by other factors, and substantive law was only a secondary one.⁷⁷⁵ In view of this, it appears that the dichotomy between substantive law and procedural law does not exist as a separate factor category, but as one of the factors that influence decision making in relation to the choice of court. Questions 14 to 19

⁷⁷⁴ Of course, there are cases where procedure is of the essence, or where substantive law is of the essence. In these cases, the most important aspect dictates the other choices.

⁷⁷⁵ Some of the comments mentioned ‘home advantage’, ‘functionality of the legal system...’, ‘...reasons of enforceability/practical reasons’, and ‘... court’s reputation...’ as factors that are more important than substantive law or procedural law.

follow up on this issue, and collect data on jurisdiction preferences and factors influencing respondents when they choose a court.

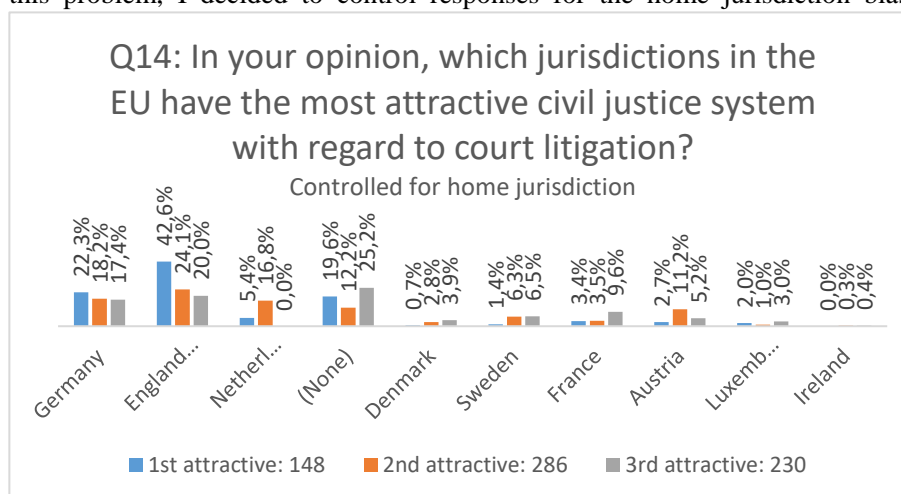


Question 14 asked respondents to name the three most attractive jurisdictions with respect to their court litigation.⁷⁷⁶ They could choose to name only one or to choose none. Results show that Germany is considered the first most attractive jurisdiction by 31.5% of the respondents, followed by England and Wales (25.2%) and the Netherlands (11.5%). As regards the second most attractive jurisdiction, respondents consider it to be England and Wales, with 22.3% of the preferences followed by Germany (18.1%) and the Netherlands (16.9%). The third most attractive jurisdiction is considered to be England and Wales with 16.8% of the preferences followed by Germany (15.1%) and the Netherlands (10.5%).⁷⁷⁷ Some respondents commented that they consider Switzerland, the US, and Norway to be attractive jurisdictions, and arbitration to be an alternative to court, but this was not included in the survey's options. As indicated in some of the comments, choosing a court depends on the case at hand. However, there are characteristics equally important to all cases, which play an important role. For example, some respondents' comments on costs suggest that England is the best option '...but it can be prohibitively expensive'; another respondent wrote: 'the UK because of

⁷⁷⁶ Assuming that lawyers would have, on average, practical knowledge of three jurisdictions, Question 14 asked them to rank the three. The assumption on which the question was drafted was confirmed by the results of Question 6, where it was found that respondents, on average, are familiar with 3.23 courts.

⁷⁷⁷ The most chosen option was 'none', with 20.4% of the preferences.

the language, but you have to consider the costs'; or 'the UK is most likely to get a correct result, but very expensive'; and another consider said: 'Litigating in Germany is quite cheap...'. Other comments involved the speed of Luxembourgish courts, the claimant friendliness of Dutch courts, and the efficiency and high quality of Dutch and German courts. In addition to qualities of the court or the case, some respondents commented that their choice was biased in favour of their home jurisdiction. One respondent commented: 'differences [between different jurisdictions] are minor and priorities mostly due to national bias for one's own courts ("the devil you know")'.⁷⁷⁸ Home bias, as the tendency to choose the court of one's home jurisdiction was also acknowledged by the Oxford survey. Home bias deforms the result of the survey, and gives an advantage to the jurisdiction from which most respondents came. To overcome this problem, I decided to control responses for the home jurisdiction bias.



From the Question 14 results, I removed data where respondents had picked their own jurisdiction as one of the three options. However, I considered home jurisdiction of the respondents in the answer they provided in Question 5. It should be also recognised that controlling for the home bias, contains a certain degree of arbitrariness. While a respondent is considered biased when choosing his home jurisdiction, it can be that their choice is based only on the merit and not on the bias. This means that both charts for Question 14 should be considered together during the analysis. Controlling data this way showed that England and Wales with 42.6% was the first most attractive jurisdiction followed by Germany (22.3%) and the Netherlands (5.4%).⁷⁷⁹

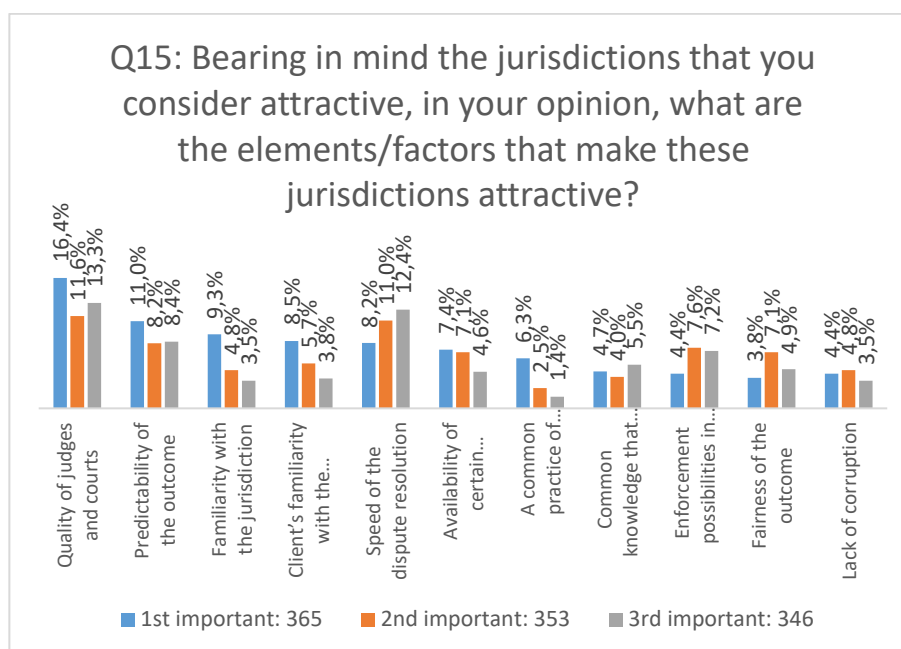
⁷⁷⁸ Words in square brackets are mine.

⁷⁷⁹ In this case, the option 'none' (19.6%) is also the third most chosen option.

Immediately noticeable was the increase in the choice of England and Wales and the decline of all the others.⁷⁸⁰ Despite the decline, Germany was the second most attractive jurisdiction, with two times fewer preferences than England and Wales, and almost five times more than the Netherlands, in third place. Clearly, home bias plays a role in the choice making of lawyers. This was observed by the Oxford survey, and was also predicted by the theoretical analysis in Chapter 4. Lawyers have a great deal of knowledge, and have invested time and resources in their home jurisdiction, which gives them a competitive advantage over foreign lawyers. In addition, choosing the home jurisdiction can be less expensive, and might increase the benefits for local clients. Therefore, choosing the home jurisdiction seems to be almost the default choice for many lawyers. Removing this default choice reveals England and Wales as the option that most attracts lawyers. Although predictable, the choice is puzzling. While England and Wales do not seem to excel on the EU Justice Scoreboard,⁷⁸¹ England still remains the best choice for many lawyers. A possible reason for the discrepancy can be that the factors considered by lawyers are different from those measured by the Scoreboard.

⁷⁸⁰ The second and third most attractive list gives almost the same result for the first two positions as the first most attractive one. England and Wales (24.1%, 20%) and Germany (18.2%, 17.4%) are the first two. The Netherlands (16.8%) and France (9.6%) are the third-best options for the second- and third- most attractive jurisdictions. It is remarkable to note the increase regarding Austria, from 2.7% as the first most attractive option to 11.2% as the second most attractive option.

⁷⁸¹ See Section 5.1.



Considering the above, Question 15 asked respondents to rank the first three elements/factors that they considered attractive in the jurisdiction they chose in question 14.⁷⁸² Data show that ‘quality of judges and courts’ is considered the first most attractive element/factor with 16.4% of the preferences, followed by ‘predictability of the outcome’ (11%) and ‘familiarity with the jurisdiction’ (9.3%). Among the second most important factors are ‘quality of judges and courts’ (11.6%), ‘speed of the dispute resolution’ (11%), and ‘predictability of the outcome’ (8.2%). For the third most important choice, respondents considered ‘quality of the judges and court’ (13.3%), ‘speed of the dispute resolution’ (12.4%), and ‘predictability of the outcome’ (8.4%) as the top three. Language as an element/factor of influence for the choice of court was considered as such only by 4.4% of the respondents. This is surprising, given that some Member States consider changing the procedures as a step to becoming more attractive to international litigants. This does not mean that language is not important, but other elements are higher in the priority list, and maybe governments should pay attention to them as well.

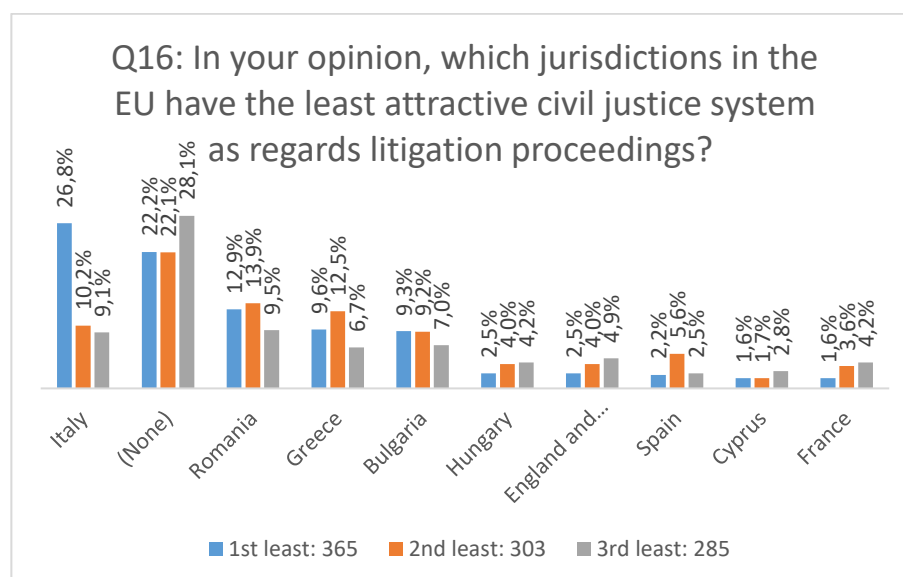
Data show that most of the respondents come from countries in north-western Europe. The same region is home to most of the jurisdictions with regard to the top ten responses to Question 14. Furthermore, countries in this region also score well in the Scoreboard (see Section 5.1). It can be argued, however, that these

⁷⁸² Responses were a list of 21 predefined options.

survey results are the outcome of an implicit bias on the part of these particular respondents. Hence, along with a supposed home bias, respondents suffer from a region bias, which would lead them to choose courts that were in their neighbourhood. At this point it, would be interesting to make regional surveys of lawyers and to examine the choice preferences of this particular group. These supposed biases, however, should not hide the real merits of qualitative jurisdictions. North-western jurisdictions are also chosen, and maybe primarily because they have good courts, as the results of the Scoreboard demonstrate.

Calculations in Section 5.1 ranked and scored figures that compared Member States with each other. These figures tried to encompass all the elements that make a judicial system efficient and that facilitate litigation. In a certain way, these elements should coincide with those that lawyers consider important. It was expected that the figures used to prepare the Scoreboard should coincide with or be similar to the results of Question 15. However, the Scoreboard has only three elements that coincide with the answers to Question 15: ‘length of proceeding’ related to ‘speed of the dispute resolution’, ‘information about the judicial system’ can be related to ‘familiarity with the jurisdiction’, and ‘quality of judges’ is related to ‘quality of judges and courts’. While there is no doubt that the Scoreboard and the figures it uses are important, the perception is that parties take into account other factors when making a choice of court.⁷⁸³ Comments from respondents to Question 15 suggest that the alternatives provided were almost the complete list of reasons they think that ‘All aspects one can choose from are important. Lack of corruption is of course fundamental, but also the reliability of procedural law, the judges, the predictability of outcome and speed are also paramount’, or ‘these [the list provided in the questionnaire] are the criteria I would normally consider when choosing jurisdiction’. Another respondent commented that ‘speed, reliability and expertise also lead to predictability and trust; all this also comes with a number of other factors such as quality of local lawyers, business experience etc.’, ‘...a ranking is difficult to establish’. From these comments, it appears that factors provided to the respondents are considered almost equally important. More data related to influencing factors and elements are provided *infra* by Questions 18 and 19.

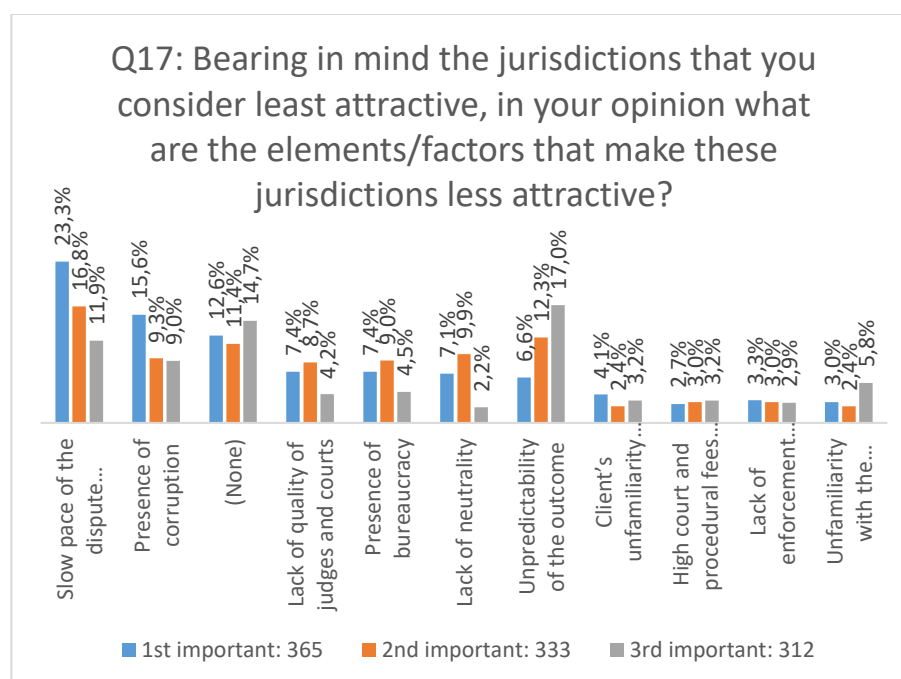
⁷⁸³ The Scoreboard’s aim is not to serve as a chart for court-hunting lawyers or parties, but to provide Member States with a tool to help determine the health of their justice system.



While Question 14 asked respondents to indicate the jurisdictions they find attractive, Question 16 asked them to indicate the three least attractive jurisdiction with regard to litigation proceedings. Respondents could choose to indicate only one jurisdiction or choose the option ‘none’. Results show that the trio composed of Italy, Romania, and Greece is consistently in the top three of the least attractive jurisdictions. The option ‘none’ is also frequent for this question, and may indicate respondents’ lack of practical experience, of strategy, or of experience in answering these types of questions. Comparing this list with the list of Member States placed last in the Scoreboard, only four of nine are on both of them, with Italy and Greece in both. Italy is infamous for the slow pace of its courts, known as the ‘Italian torpedo’.⁷⁸⁴ Scoreboard results show that disputes in Italy need around 400 days on average to be resolved. The only Member States worse than Italy are Malta, Greece, Portugal, and Cyprus. However, Italy’s poor result in Question 16 can be attributed in part to the notoriety of the term ‘Italian torpedo’ and some infamous cases such as *Gasser*. One of the members of the trio, Greece, does not have Italy’s bad reputation, but owing to the economic and political instability of the last few years, Greece has been the centre of mishaps. Romania, while scoring decently in the Scoreboard and avoiding the bottom ten position, is nonetheless considered one of the least attractive jurisdictions. In this case, other reasons like a reputation for corruption, or being an eastern country, might play a role. An interesting fact is the appearance of England and Wales, and France

⁷⁸⁴ Regarding the infamous slow pace of Italian procedures, some respondents commented: ‘In Italy, it takes ages before you get a judgment’; ‘Italy is third choice due to extremely long and slow procedures’; ‘The two above are slow (Italy) ...’.

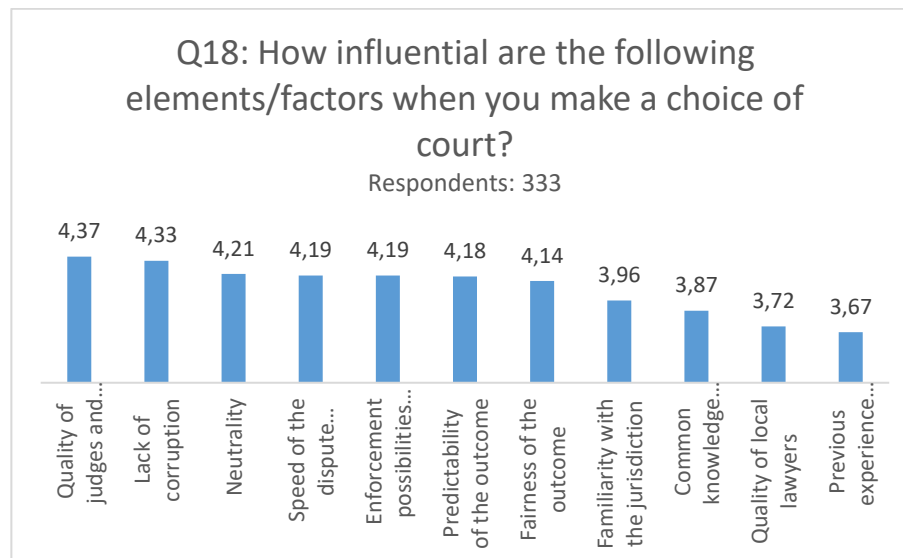
among the top nine of the least attractive jurisdictions. While France scores very low on the Scoreboard, and can be expected to be on this list, England and Wales are unattractive due to the high costs and its common law system. Commenting on England's unattractive high litigation costs, respondents pointed out '...the cost of English proceedings is horrendous', '... [English] lawyers' fees are enormously high, which is a deterrent for many clients'; while as regards common law as an unattractive feature 'The common law system is unattractive for the clients from non-common law systems', and 'It takes ages for a lawyer to read any English judgment'.



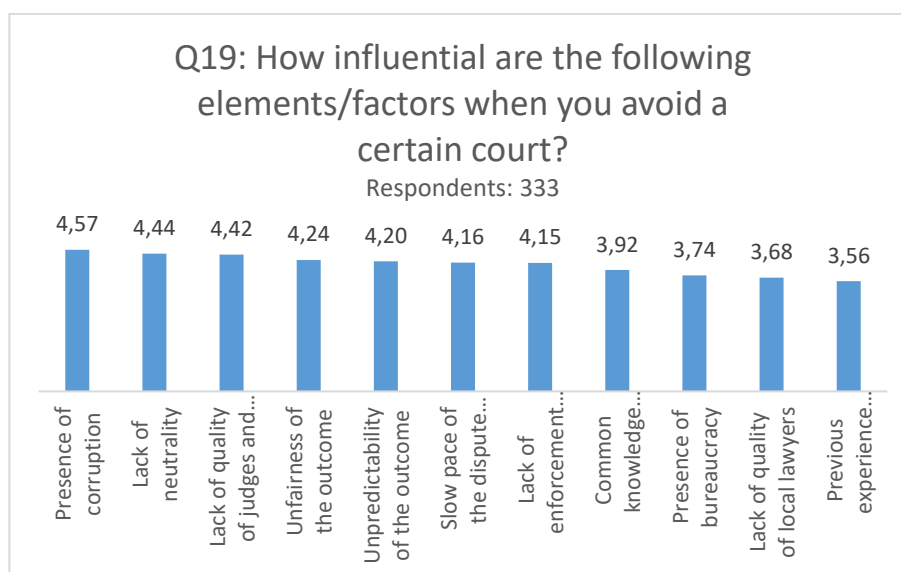
Some comments provided by respondents to Question 16 point out 'speed of proceeding' and 'costs' as factors for considering a court unattractive. Question 17 asked respondents to rank three elements/factors considered to make the jurisdiction in Question 16 unattractive. The elements/factors were predefined, and were similar to those provided in Question 15. Respondents could choose only one element/factor, and 'none' was also a choice. This question also had a space for comments. Data show that respondents consider 'slow pace of the dispute resolution' (23.3% of the respondents), 'presence of corruption' (15.6%), 'lack of quality of judges', and 'presence of bureaucracy' (both 7.4%) as the most important factors in considering a court unattractive. The second most important factors are again 'slow pace of the dispute resolution' (16.8%), 'unpredictability of the outcome' (12.3%), and 'lack of neutrality' (9.9%). The third most important

factor was ‘unpredictability of the outcome’ (17%), ‘slow pace of the dispute resolution’ (11.9%), and ‘presence of corruption’ (9%).⁷⁸⁵ Comparing these results with those of Question 16, the factors chosen here seem to reflect some of the characteristics of the jurisdictions considered as unattractive. Other factors, apart from those already mentioned, also seem to be very important. It is interesting to note that costs are not among the top ten factors that make a jurisdiction unattractive. At the same time, high costs as a factor earned England and Wales a place among the top ten unattractive jurisdictions. These two facts indicate that while costs in general are not a primary factor in making a court unattractive, for England and Wales they are. Comparing results from Questions 15 and 17, the factors considered important in both questions are not the same. These results can be an indication of how lawyer’s choice of court process unfolds. It is submitted that this process has three phases. In the first phase, a lawyer uses factors considered important (mentioned in Question 17) to build a set of the most unattractive jurisdictions. In this phase, a list is created with all the undesirable and dangerous jurisdictions. Any jurisdiction on this list would be unacceptable for a negotiating lawyer. In the second phase, lawyers build a set with the most attractive jurisdictions by applying the factors they consider important (mentioned in Question 15). This phase ‘qualifies’ attractive jurisdictions and leaves out jurisdictions that are either unattractive or unknown. While unwanted jurisdiction are immediately discarded from any consideration, unknown jurisdictions are more ‘exotic’. The tendency would be to discard them because they are unknown, but further investigation could make them acceptable. The third phase is choice making, where lawyers pick a jurisdiction from the list created in phase two. Choice in phase three is made by taking into account the case, the requirements of the client, the opposing party, and other relevant factors. The whole process divided into these three phases does not have to be elaborate, as it can be expected that the process is short and instinctive. While many jurisdictions are unknown to many lawyers, they fall into the ‘unknown’ set and are neither part of the unattractive set nor of the attractive set. Unattractive and attractive sets are important during the negotiation phase, as here each party proposes an option for the choice of court clause. If the choice falls within one of the sets, each lawyer knows instinctively what to do: namely, avoid unattractive, welcome attractive. If a proposal falls into the unknown set, negotiations will stop until the parties determine whether the proposed jurisdiction is attractive or unattractive.

⁷⁸⁵ The option ‘none’ was the third most preferred option, with 12.6%, 11.4%, and 14.7% as the 1st, 2nd, and 3rd most important choice, respectively. Some respondents commented that they did not have enough experience with all the jurisdictions, and therefore they selected the option ‘none’.



Question 18 asked respondents to indicate how important certain elements/factors are for the choice of court. The same elements/factors offered in Questions 15 and 17 were offered here. This time, for each element/factor, respondents could indicate whether it was ‘not at all influential’, ‘slightly influential’, ‘somewhat influential’, ‘very influential’, ‘extremely influential’, and N/A. I gave 1 point to the option ‘not at all influential’, 2 points to ‘slightly influential’, 3 points to ‘somewhat influential’, 4 points to ‘very influential’, and 5 points to ‘extremely influential’, and calculated the average score for each element/factor based on the number of respondents for each of them. Calculating the average for each element/factor reveals that ‘quality of judges and courts’, ‘lack of corruption’, ‘neutrality’, ‘speed of the dispute resolution’, and ‘enforcement possibilities in that jurisdiction’ are considered the five most important elements when choosing a court. ‘Quality of judges and courts’ and ‘speed of the dispute resolution’ are also present in the top five answers to Question 15. Results from Questions 15 and 18 could have been expected to be the same, however it should be considered that they are relevant for different phases of the choice making process. The elements/factors ranked in Question 18 play a role in the second phase of the process, which qualifies jurisdictions in terms of whether or not they are attractive. In the third phase, the elements/factors of Question 15 are used to make the actual choice. In fact, among the top five elements/factors in Question 15 are ‘familiarity with the jurisdiction’ and ‘client’s familiarity with the jurisdiction’, which are useful when discussing precise and concrete jurisdictions.



Question 19 asked respondents to evaluate the importance of certain elements/factors when trying to avoid a court. The same elements/factors used in the other questions were used in Question 19. The modalities for responding to this question and their analysis are the same as for Question 18. Results show that the first six elements/factors mentioned are ‘presence of corruption’, ‘lack of neutrality’, ‘lack of quality of judges and courts’, ‘unfairness of the outcome’, ‘unpredictability of the outcome’, and ‘slow pace of the dispute resolution’. Compared with the results of Question 17, five of the first six elements/factors in both lists coincide. Considering a court unattractive and avoiding a court is the same. In fact, they occur together in the first phase of choice making, in which lawyers as choice makers create a set of ‘unattractive’ jurisdictions.

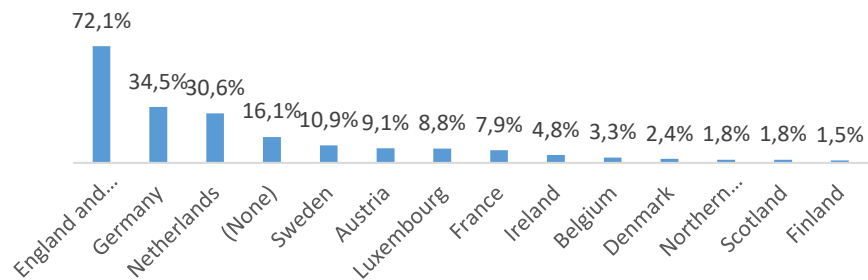
5.3.4.3 Respondents’ view on the civil justice system in the EU

In the third part of the survey, respondents were asked questions related to the civil justice system in the EU. Question 20 asked respondents to indicate the Member States that actively attract or promote their court system. More than one choice was possible. Data from Question 20 show that England and Wales are considered by 72.1% of the respondents to be the most active in attracting litigants or promoting their courts. Germany (34.5%) and the Netherlands (30.6%) follow the second and third place.

For this question, the home bias might play a role in distorting the data. On the one hand, controlling for the home jurisdiction removes the distortion produced by the home bias, while on the other hand, it provides data as to how much the competitive activities of each jurisdiction are known outside of their borders.

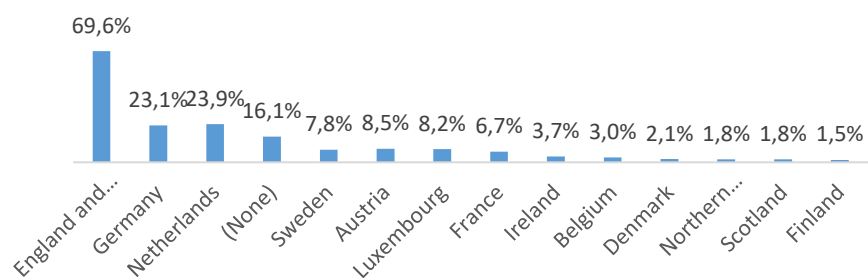
Q20: According to you, which of the following jurisdictions in the EU actively attracts litigants to (promotes) its court system?

Respondents: 330



Q20: According to you, which of the following jurisdictions in the EU actively attracts litigants to (promotes) its court system?

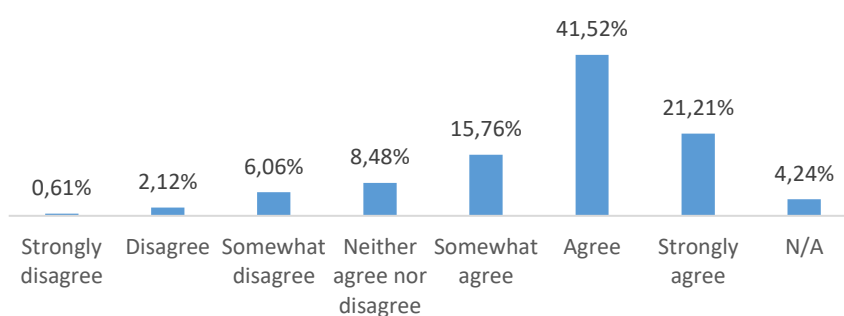
Controlled for home jurisdiction



The control was done by removing from the Question 20 results the responses of those lawyers who mentioned the same jurisdiction that they had mentioned in Question 5 (jurisdiction where they mainly operate). Results show that a large majority (69.6%) of the respondents still consider England and Wales to be the most active in attracting litigants. The Netherlands and Germany exchanged second and third place, while having almost the same number of respondents. Considered as an active competitor in Section 5.2, France follows Sweden, Austria, and Luxembourg in the ranking. For 16.1% of the respondents, none of the jurisdictions in the EU is making any effort to attract litigants or to promote itself. Apart from the result of France, the result of the other jurisdictions was expected. In fact, I would have expected Germany's score to be higher than that of the Netherlands. Evidently the brochure 'Law Made in Germany' is not enough to promote German courts. Perhaps more marketing is needed.

Q21: The differences between civil law courts and common law courts are considerable.

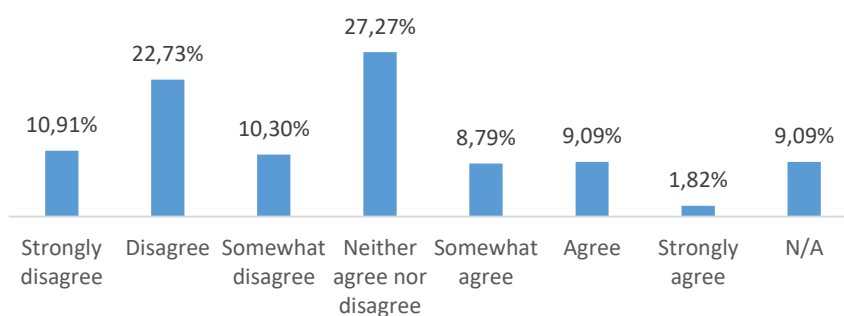
Respondents: 330



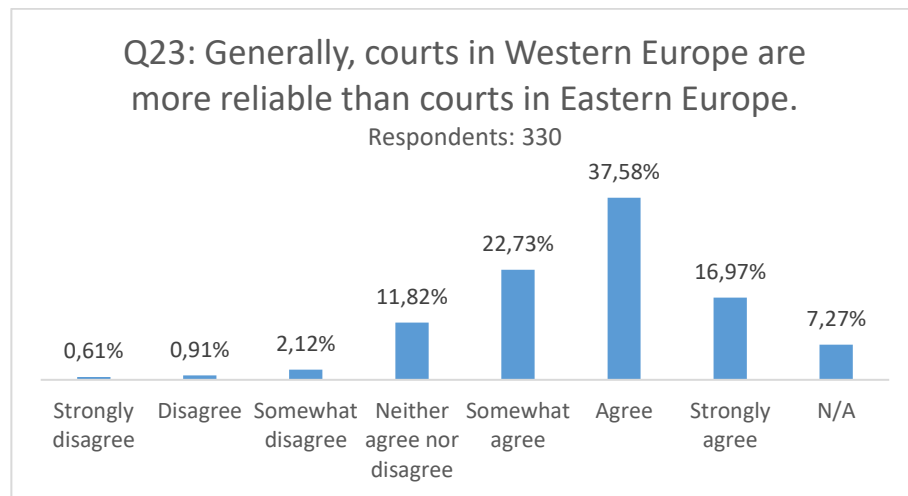
Questions 21 and 22 asked respondents to compare common law and civil law courts. Question 21 asked respondents if there was a considerable difference between common law and civil law countries. Respondents generally agree that the difference is considerable. However, this difference was pointed out only episodically as a factor in choosing or avoiding a court. In other words, apart from procedural differences, there should be no differences in difficulty between the two systems. On this issue,

Q22: It is easier to litigate in a common law country than in a civil law country.

Respondents: 330



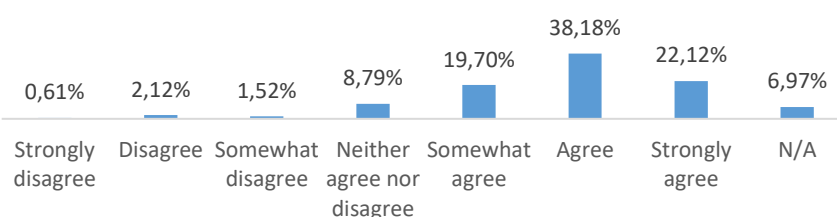
Question 22 asked respondents to compare the difficulty of litigating in a common law country and a civil law country. Data shows that respondents do not consider litigating in common law countries easier than in civil law countries. In fact they are mostly neutral in this regard.



Questions 23 and 24 asked respondents to compare some regions of Europe with respect to their court system. Question 23 asked respondents whether they agreed with the statement ‘Generally, courts in Western Europe are more reliable than courts in Eastern Europe’. The aim was to determine whether a general negative opinion exists regarding Eastern European courts. Any such opinion can create a bias in the choice of court. Data shows that respondents, who are mostly Western European lawyers, agree that courts in Eastern Europe are not reliable. Question 24 aimed at comparing Northern Europe with Southern Europe. Respondents were asked if they agreed with the statement ‘Generally, courts in Northern Europe are more efficient in terms of proceeding time, review of documents, and response time, compared to courts in Southern Europe.’ Again, a negative image of Southern Europe (Spain, Italy, Greece) might create biases toward courts of specific jurisdiction, but could also punish other courts that do not deserve the negative reputation. Data for this question are comparable with those from Question 24. Respondents consider courts in the northern jurisdictions to be more efficient than those in the south.

Q24: Generally, courts in Northern Europe are more efficient in terms of proceeding time, review of documents, and response time, compared to courts in Southern Europe.

Respondents: 330



5.4 Conclusions

The first three chapters provided an analysis of how the competition of civil justice systems unfolds (Chapter 4), of what comprises the legal framework that facilitates this competition in the EU (Chapter 3), and of how the civil justice system competition relates to other key concepts of jurisdictional competition (Chapter 2). Complementing the analysis in these chapters, Chapter 5 offered an empirical overview of the demand side and the supply side of the civil justice system market. The aim of this chapter was to provide empirical evidence to support and enrich the analysis in the other chapters. Chapter 5 was divided into three parts. The first part focused on the role of the EU in relation to the civil justice system competition, while the second part focused on the competition activities of some Member States. The third part presented the findings of a survey conducted by the author on lawyers from the top law firms in the EU considered by their revenues.

The first part of this chapter was dedicated to the role of the EU in relation to the competition involving civil justice systems. The claim here is that the EU plays a significant role. While the analysis produced no evidence of the EU's direct involvement in the competition, there is sufficient evidence that the EU is a powerful catalyst in this process. The first evidence was produced in Chapter 3, where the EU's role as the creator and the keeper of the legal framework of the civil justice system competition was discussed. The analysis revealed that the EU maintains, among others, a strong interest in improving cross-border procedures, common rules, and eliminating obstacles to the civil proceedings. Eliminating

obstacles and facilitating cross-border litigation fosters the premises for the further development of the civil justice system competition.

In relation to this, the Treaty of Amsterdam was the first step towards a European Area of Justice, which is an area of freedom, security, and justice, without internal frontiers, and based on four principles: mutual trust, economic growth through better justice, simpler justice for citizens, and protection of fundamental rights. The related political priorities were set out in the EU Justice Agenda 2020, which considers that the court system plays an important role in economic growth and financial stability in the EU. Efficient and qualitative judicial institutions provide predictability, fairness, and stability to investors, along with sustainable economic growth. This is why the EU motivates Member States to have more efficient and qualitative courts. Part of the EU's motivating strategy is the EU Justice Scoreboard.

Published annually by the European Commission, the EU Justice Scoreboard provides data on the health of each Member State's justice system. Member States provide data related to the litigious civil justice with a particular focus on commercial and administrative cases. The Scoreboard contains figures indicating where specific data from all the Member States are confronted with each other. While the Scoreboard is not designed to declare a winner or a loser, Member States can compare their results with regard to specific elements of their judicial system.

Analysing Scoreboard data can reveal which Member State has the best judicial system, which excels in specific parameters, and which needs to reform its judicial system. In view of this, the Scoreboard is important for the civil justice system competition in the EU, because it provides an overview of the quality of the supply side. The analysis conducted in Section 5.1.3 used only figures meaningful for the civil justice system competition. It emerges from the analysis that Luxembourg, the Netherlands, Denmark, Estonia, and Austria have the best judicial systems in the EU. At the same time, the Czech Republic, Poland, France, Slovakia, and Cyprus are in the last position. This ranking is helpful in three respects. First, it suggests that Luxembourg, Denmark, Estonia, and Austria have the highest potential in the civil justice system market. Second, it can be submitted that competing Member States do not necessarily have the best legal system. Third, the Scoreboard in conjunction with the Choice of Court Survey helps us to understand whether or not the demand side is choosing the highest scoring Member States.

Section 5.2 analysed the position of England and Wales, France, Germany, and the Netherlands with regard to the civil justice system competition, and they were seen to be the most active competitors in the EU, as well as Luxembourg and

Denmark as two of the best Member States based on the Scoreboard. Denmark is one of the best performing Member States, with fast, efficient, and transparent courts, but shows no interest in competing to attract foreign litigants. Similarly, Luxembourg offers attractive courts with fast and efficient proceedings, but lacks activities aimed at attracting foreign litigants. While it can be argued that political will to compete is missing, business groups – at least in Luxembourg – use the efficiency and the quality of the country’s courts as an incentive for parties wanting to invest in their jurisdictions. A common characteristic of Luxembourg and Denmark is the absence of interest from their governments in the competition of jurisdictions. Arguably, parties interested in the civil justice system competition, like lawyers, would be the motor that would drive these governments to compete.

Bar associations and similar organisations are important in lobbying their governments to be active competition. The legal business also has an important economic output, and therefore not only lobbying but also economic reasons provide the stimulus for the governments of England and Wales, Germany, France, and the Netherlands to be politically active in attracting cross-border litigants. England, Germany, and France have been engaged in a war of brochures, where each of them has tried to impress litigants with the qualities of their system. However, claims of superiority are not always supported by evidence or by the Scoreboard results. Compared to the others, England seems to be more active and diverse in its activities, which range from facilitating the presence of foreign lawyers in English proceedings to organising seminars to promote English courts. Among the group of competing countries, the Netherlands appears to be less active in producing brochures, but more active in terms of actions. Arguably the most distinct action was the Dutch government’s decision to create a Commercial Court that will litigate in English and deal exclusively with certain cross-border commercial cases. The court is scheduled to begin functioning in January 2018. It can be argued that while the brochure war can help competitors attract litigants, concrete actions might be more productive. However, this still depends on what and how litigants choose.

Section 5.3 presented the findings of a survey conducted by the author among lawyers from the top law firms in the EU. As was explained in Chapter 4, lawyers exercise considerable power over their clients, which allows them to make most of the legal choices, including choice of court. Chapter 4 concluded that in the civil justice system competition, two important characteristics for the demand side are mobility and relatively extensive resources (mostly economic). Litigants with high mobility and sufficient resources tend to choose the top law firms to protect their interests. Given that the lawyers market is of the superstar kind, the top law firms would be those that earn the most revenue. Considering the above, I decided

to distribute the survey among lawyers working for the top one hundred law firms in the EU and the EU offices of the top one hundred global law firms. Of the 529 responses to the survey, 330 were complete.

The majority of the respondents were partners or senior associates with more than eleven years of experience. Survey results show that a large majority of lawyers speak English, while other languages are far less popular. This is not surprising, but reinforces the idea that competitive courts should litigate in the lingua franca of modern business, which is English. Experience with courts was relatively low. On average, lawyers have experience with 3.23 courts (including in their home jurisdiction), which means that their practical knowledge of other jurisdictions is limited. Limited information on what the supply side offers can limit the ability of the demand side to choose, and as a consequence can hinder the development of competition. The survey did not find any connection between the places where the lawyers had studied and their choice of court.

As was mentioned, Chapter 4 concluded that lawyers exercise considerable power over their clients, and are the effective decision makers when it comes to choice of court. Data from the survey support this claim. The majority of the lawyers responded that they discussed choice of court with their clients in more than 50% of the cases. However, the majority of the respondents considered that the final choice of court is made by the lawyers and not by their clients. Respondents also considered that when clients make a choice of court, they choose the one recommended by their lawyers.

Considering the power that lawyers have, the second part of the questionnaire was dedicated to lawyers' choice of court preferences. The most attractive jurisdictions were England and Wales, Germany, and the Netherlands, while Italy, Romania, and Greece were considered the least attractive. Comparing the list of the most attractive jurisdictions with the list of the highest scoring jurisdictions from the Scoreboard demonstrates substantial differences between the two. This means either that lawyers use other criteria to assess the quality of a court or that they simply do not bother to choose the best court in the EU. The same is also true for the list of the most attractive jurisdictions. When asked which element makes the jurisdiction they choose the most attractive, lawyers mentioned quality of judges and court, predictability of the outcome, and familiarity with the jurisdiction. At the same time, 'slow pace of the dispute resolution', 'presence of corruption', and 'lack of quality of judges and courts' are the most mentioned elements of the least attractive courts.

Following up on the court elements, lawyers were asked to evaluate how important certain criteria were in general for choosing or for avoiding a court. Lawyers considered 'quality of judges and courts', 'lack of corruption', and

‘neutrality’ as the most important when choosing a court. ‘Presence of corruption’, ‘lack of neutrality’, and ‘lack of quality of judges and courts’ were considered as the most important when avoiding a court. Comparing the elements considered important, and taking into account specific courts and elements considered important in general, a discrepancy between the two lists can be distinguished, while at the same time no discrepancy can be observed between the lists of courts to be avoided. It was suggested that this is a result of the lawyers’ choice of court process, which is composed of three phases. During the first phase, lawyers create a set of unattractive jurisdictions on the basis of the elements mentioned above. In the second phase, a set of possible jurisdictions is created to choose from based on the general elements used to consider a court attractive. At the end of the second phase, lawyers have a set with jurisdictions to be avoided and a list of possible jurisdictions to be chosen. Obviously, there are many jurisdictions outside of these sets. The third is the choice making phase, in which lawyers choose one or more jurisdictions from the second set based on the characteristics of the case, the client, or other case-related elements. During negotiation, lawyers will refuse courts from the first set and negotiate regarding courts from the second set. If a non-categorised court is offered during negotiations, lawyers are expected to take time to determine the category of this court. The process described here is often instinctive. Lawyers already know which jurisdiction to avoid and which to choose, based on experience or on anecdotal evidence of a general opinion about a court. Given that lawyers have an average personal experience with 3.23 courts, anecdotal evidence or a general opinion shape lawyers’ opinions with regard to courts. It is therefore understandable that governments undertake marketing campaigns to promote their jurisdictions, but it is not clear with what results.

The analysis in Chapter 4 highlighted the elements that parties consider – or should consider – when making a choice of court. Survey results show that lawyers consider important the same elements that were highlighted in Chapter 4. It should be taken into account, however, that Chapter 4 considered elements from the perspective of clients. It is probable that lawyers would have different priorities, but the elements to be considered for a jurisdiction would be the same.

Chapter 5 aimed at enriching with empirical data the analysis offered in the other chapters. The analysis failed to find any direct interest of the European Union in the civil justice competition. However, the EU plays an important role in creating the political and legal framework where the countries compete. One important instrument is the EU Justice Scoreboard, which provides data and ranks Member States on important elements of the justice system. These data show that the best jurisdictions are not necessarily those that compete in the EU. Denmark and Luxembourg have the best scores, but they show no particular – if any – interest

in competing. In these jurisdictions, legal business is financially significant, but local interest groups seem to lack the desire to compete in the civil justice system market that would push their governments to enter the race. Competing Member States have active interest groups that pressure governments to take steps in attracting litigants, and governments employ marketing strategies to promote their jurisdiction. While the financial interests are significant, none of the competing governments have approved reforms to attract cross-border litigants. An exception to this is the Netherlands, which has established a court with jurisdiction over cross-border commercial cases that offers the possibility of hearing cases in English. According to my survey, the Netherlands, England, and Germany are the Member States that most of the lawyers considered attractive; with courts' quality and predictability together with the lawyers' familiarity with them being the most attractive elements. However, these elements are not necessarily what make a court attractive in general. An explanation for this discrepancy might lie in the process that lawyers follow when choosing a court. This process consists of three phases. In the first and second phase, a list is created of unattractive and attractive sets of courts, respectively. General criteria are used. The third phase is the process of choosing a court from among those in the second set. The third phase makes use of elements and criteria with regard to the particular legal situation at hand. The survey results support the theoretical claim that choice of court is made by lawyers rather than clients. Data show that even in cases in which clients make the final choice, they are following their lawyer's advice.

Competition between jurisdictions is a slowly growing process, although many jurisdictions in the EU have the necessary potential to attract cross-border litigants from jurisdictions that are already competing. Legal and political developments might provide the necessary spark that competition needs in order to intensify. Empirical studies can provide the required information both for governments and litigants so that they might appreciate the benefits of the civil justice system market.

Chapter 6 Conclusions

This chapter marks the end of this research, and summarises its main findings following the structure of the foregoing chapters.

6.1 A study on the competition of civil justice systems in the EU

6.1.1 A Grand Tour of Europe's courts

The early 2000s saw a number of wealthy businessmen enter London's courts with an army of lawyers behind them. Examples mentioned in Section 1.1 include *Berezovsky v Abramovich*,⁷⁸⁶ *Cherney v Deripaska*,⁷⁸⁷ *Pinchuk, Kolomoyskyi v Bogolyubov*,⁷⁸⁸ *BTA Bank v Mukhtar Ablyazov*,⁷⁸⁹ and *Berezovsky v Patarkatsishvili*,⁷⁹⁰ These cases had in common a lack of connections to the UK, the fact that the disputes involved billions of Euros, and that the litigants were wealthy businessmen from the ex-Soviet Union. In several instances, parties lacked any connection to London courts, but they agreed to litigate in them anyway. Similar cases also have been witnessed in other European courts. One of these involved ABA shpk from Albania and ENEL spa from Italy, who were litigating in the Dutch courts an Albanian dispute with no apparent connection to the Netherlands. Not surprisingly, local lawyers were very keen to have these litigations taking place in their jurisdictions, because cross-border cases are highly lucrative. Not only lawyers but governments as well are interested in attracting cross-border litigants. These activities of course did not escape the attention of journalists, who referred to them as a competition to attract cross-border litigants.⁷⁹¹

⁷⁸⁶ *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm).

⁷⁸⁷ Settled out of court.

⁷⁸⁸ Settled out of court.

⁷⁸⁹ *JSC BTA Bank v Ablyazov* [2015] UKSC 64.

⁷⁹⁰ Settled out of court.

⁷⁹¹ Adil Mohamedbhai, 'Why do Russian oligarchs love the English courts?' (The Lawyer, 19 October 2016) <<https://l2b.thelawyer.com/why-do-russian-oligarchs-love-the-english-courts/>> accessed 22 December 2017.

Khristina Narizhnaya, 'Russian oligarchs take over London courts' *Public Radio International* (17 February 2012) <<https://www.pri.org/stories/2012-02-17/russian-oligarchs-take-over-london-courts>> accessed 22 December 2017.

6.1.2 Competing for litigants

England was one of the first jurisdictions to explicitly encourage litigants to present their cases in its courts. In 2007, the Law Society and a group of law firms published a brochure called 'England and Wales: the jurisdictions of choice'. In 2009, Germany published a similar brochure titled 'Law Made in Germany'. Also in 2009, a French and German collaboration resulted in a brochure called 'Continental Law'. All these activities were supported by governments and by interested professional organisations, and all were aimed at attracting litigants to their jurisdictions. This brochure war ended quickly, but competitive activities continued, and Germany, France and the Netherlands began to consider legislative changes in order to make their jurisdictions more appealing to international litigants.

6.1.3 Research question

In view of these developments, and considering the EU's efforts to enhance cross-border commerce, the present research aims at examining the development of the litigant-oriented competition between EU Member States. Future developments such as Brexit will probably affect choice of court and litigation strategies in Europe, with significant repercussions as regards the competition for litigants. For the purpose of the study, the main research question was: '**How do civil justice systems compete in the European Union?**' Competition in this sense should be understood as overt attempts to attract litigants to the civil justice system of a jurisdiction. It is therefore implied that jurisdictions compete in terms of their entire judicial system, with the court as the focal point. It is also true that litigants make a choice of court, and perhaps do not give too much thought to the entire civil justice system; in effect, however, that is precisely what they choose. Furthermore, the research question implied the existence of a competition before the study was started. This implication was based on the few anecdotal evidence that were presented in Chapter 1, and did not affect the research, which was open to any conclusion.

6.1.4 Approaching the research

The approach taken in conducting this research involved a theoretical analysis of the competition's components and an empirical study of lawyers' preferences and governments' competitive activities.

Mike Giglio, 'Oligarch v. oligarch: London's courts attract litigious tycoons' *The Daily Beast* (23 July 2012) <<http://www.thedailybeast.com/oligarch-v-oligarch-londons-courts-attract-litigious-tycoons>> accessed 22 December 2017.

Rupert Neate, 'Top London law firms profit from feuding Russian oligarchs' *The Guardian* (4 September 2012) <<https://www.theguardian.com/law/2012/sep/04/london-abramovich-v-berezovsky-court-case>> accessed 22 December 2017.

The theoretical analysis was split into three parts. In the first, a general analysis of regulatory competition was conducted, and was aimed at exploring and analysing the notion of regulatory competition, the consequences of competition on the quality of laws, and problems related to choice making. The second part consisted of an analysis of the legal bases that support civil justice systems in the EU, and the relation between this competition and the harmonisation of European procedural law. The third part was an analysis of the civil justice system market, the good in the market, the supply and the demand side, and the result of a demand created by a unilateral or a bilateral choice of court.

The empirical study consisted of three parts. The first was a study of the 2016 EU Civil Justice Scoreboard, and the aim was to assess the quality of EU Member State courts, taking into account the needs of the civil justice system competition. In the second part, the research continued with a survey on the economic importance of legal business for some competing jurisdictions, and on the competitive activities undertaken by Member States. Statistical data from several jurisdictions were collected and analysed. In the third part, a questionnaire was distributed among lawyers in the EU with the intention of collecting data on their choice of court preferences. This questionnaire built upon the theoretical analysis of the other chapters as well as upon an analysis of similar surveys conducted in the EU.

6.2 General overview of regulatory competition

6.2.1 Benefits of competition and some doubts

Studies have shown that competitive markets are more profitable than ones that are less competitive, because they promote more economic growth and are more resilient in the face of economic downturns. Competition also stimulates more efficient use of the workforce as well as reductions in costs through research and development.

Research and development as a consequence of competition promotes the accumulation of information and knowledge, and the development of social order. Indeed, this knowledge is accumulated – among others – for the purpose of overtaking other competitors, and, in general, is a benefit not only for companies but also for the population. Competition is also able to create some form of social order. In a confrontation involving social norms, only the one that serves society better will survive. Applied to the civil justice system competition, these theories show that competition fosters the development of laws and institutions; better fulfils the needs of consumers; and can be a more natural way of harmonising laws (see also Section 3.3.3.2).

However, competition between countries should be distinguished from that between companies, and both of them should be distinguished from regulatory competition. As regards the civil justice system competition, it was argued (Section 2.1) that intense competition between jurisdictions can be to the detriment of weaker parties, although Member States can avoid regulatory competition in the event of insufficient benefits or unacceptable dangers. Avoiding competition does not always mean avoiding its influence. Through cross-fertilisation and intellectual influence, developed ideas will affect even the most isolated country.

6.2.2 Tiebout's theory

In the 1940s and 1950s, some scholars were trying to find a market-derived solution that could determine the level of expenditures on public goods.

According to these authors, one of the characteristics of public goods is that governments cannot determine consumers' preferences for these goods, and as a consequence have difficulties in allocating resources for them. Tiebout developed a theory (Section 2.1.4) according to which jurisdictions competing to attract mobile consumers are able to optimally allocate their resources. The mechanism proposed by Tiebout requires some competing jurisdictions to attract mobile consumers by offering a different set of public goods. Consumers choose the jurisdiction that better serves their needs in terms of taxation level (price of the good), and of the quality and quantity of the good on offer. Governments would have a better understanding of consumer preferences and find it easier to allocate their resources. Applied to the civil justice system competition, Tiebout's theory suggests that competing jurisdictions would find an appropriate caseload level that they could handle, an appropriate fee level, and appropriate regulations based on the type of litigants that would use their jurisdictions. However, Tiebout's theory relies on certain assumptions that are not likely to occur. Nevertheless, his theory is valuable, as it shows in a simplified way how competition can be beneficial to both consumers and governments.

6.2.3 Lessons from the competition of jurisdictions in other fields of law

Scholarship with regard to competition in company law is particularly abundant in the US, and serves as an example (with the appropriate corrections) of how the civil justice system competition can develop. Studies in the US suggest that the company law market is dominated by the state of Delaware, which is able to attract the vast majority of US companies thanks to its legal infrastructure and institutional framework. Scholars argue whether Delaware's dominating position means that there is no more competition, but a definitive answer has not yet been provided. Furthermore, it is debated whether (Section 2.3.1) Delaware's

dominating position allows for the development and predictability of law. Development depends on competition: namely, the more competition, the more laws are able to develop. Predictability depends on the interest of the demand side. If the demand side is not interested in predictability, the law will not be predictable. Furthermore, competition in company law provides some hints regarding the benefits of competing jurisdictions. Direct benefits are the fees collected from consumers, while indirect benefits derive from taxing businesses related to company law. It is also clear that consumers take advantage of the different legal solutions offered to them.

Studies on competition in labour law suggest that – in a process known as *social dumping* – successful countries attract educated, skilled employees, while less attractive countries are left with less qualified employees. The same is likely to happen with the civil justice system competition. Some jurisdictions will attract more cases, thereby gaining more experience and making their courts even more attractive. Less appealing jurisdictions will not be able to gain as much experience, and therefore will lag behind in expertise.

6.2.4 Race-to-the-bottom or race-to-the-top

The analysis of the competition in other fields of law showed that scholars are concerned about a possible race-to-the-bottom, which means a deterioration in the quality of law as a consequence of regulatory competition. Quality of law in many cases is considered from the perspective of weaker parties, who, as vulnerable subjects, deserve special attention. The opposite of race-to-the-bottom is race-to-the-top, which denotes an improvement in the quality of the law as a result of the competition. The bottom and top duopoly struggles with situations in which there is no weaker party, or in which there is more than one. In these situations, it becomes difficult to assess what happens to the quality of law. A solution would be to consider a different scale that would measure the desirability and undesirability of the effect of legislation, and at the same time assess its strictness or laxity. Although not perfect, such a scale might serve as an inspiration to develop more sophisticated measurement tools.

The problem of a race-to-the-bottom in the civil justice system competition should not be understated, and competing jurisdictions should be prepared for this eventuality, by adopting common minimal rules in order to guarantee the rights of weaker parties. Furthermore, competing jurisdictions would compete for better laws, with no possibility of competing for weaker ones. In Europe, EU institutions can take the position of the law maker that guarantees minimal standards and helps civil justice system competition to improve its quality of law and its service. Currently, EU institutions are considering a Draft Directive containing common

minimum standards for civil procedure.⁷⁹² Although this Draft Directive is a consequence of the competition between jurisdictions, it would stop the race-to-the-bottom that is a result of the civil justice system competition.

6.2.5 Choice making

Competition is possible if consumers are able to choose. Choice, however, appears to be a complicated process influenced both by hidden psychological factors and explicit material factors. Empirical research shows (Sections 5.3.1.2 and 5.3.4) that choice of court and choice of law are also often influenced by psychological factors. The impact of these factors in choice of court is not clearly understood, owing to the lack of both empirical and theoretical studies. More research on the psychology of choice of court would be beneficial for all parties involved in the civil justice system competition.

Psychologists suggest (Section 2.5.1) that people organise the world of possibilities in front of them into distinct categories, and choice makers express their preferences within these categories. These are created, for instance, by habit, cultural norms, and tradition, while preferences can be both unconscious and conscious. For example, if a lawyer is asked to make a choice of court for a client, he has the possibility of choosing from among twenty-eight jurisdictions. The lawyer, however, creates in his mind three categories in which all the possibilities are placed. In one category are ‘unknown courts’, in another are ‘bad/don't go courts’, and in the third are ‘good/go courts’. Once the possible jurisdictions are placed in each category, a choice-making lawyer uses his preferences to choose between them. Potential preferences can be court fees, certain procedural solutions, language of proceeding, speed of proceeding, and so on. Section 5.3.4 suggests, on the basis of empirical data, that this is how lawyers make a choice of court in the EU framework. If this is true, it is highly significant for the civil justice system competition in the EU. It means that choice makers (lawyers or their clients) reduce the number of available possibilities from twenty-eight to just a few by categorising them. As a consequence, competing governments should try to influence not only the preferences of the choice makers but also the categorisations they use.

Moreover, psychologists suggest that choice making is a process that provokes anxiety. Having a plurality of possibilities creates anxiety for choice makers, because choosing one thing implies losing another. Choice makers lose the possibility of making the choice again, and by making a choice they reject all the

⁷⁹² The Draft Directive is contained as an annex in the European Parliament, ‘Report with recommendations to the Commission on common minimum standards of civil procedure in the EU’ (2015/2084(INL)), 6 June 2017. The procedure was closed on 4 July 2017.

other possibilities. Choice makers are afraid to lose these opportunities, which makes them anxious, and as a result they avoid choice making altogether or they let others make the choice in their place. It was submitted (Section 2.5.2) that lawyers face the same anxieties when they have to choose between jurisdictions.

Some choice makers are more prone to anxiety than others, which also reflects two types of personalities distinguished by psychologists: Maximisers and Satisficers. Maximisers are people who always want the best and are not happy with a second-best alternative. They tend to spend more time and effort in choice making. Satisficers are people who accept second-best options. They are able to make their choice more quickly than Maximisers, who are prone to be quickly dissatisfied with their choice. Their expectations often exceed reality, which causes them to feel less satisfied. Maximisers also tend to be less adaptive to options and to become frustrated, frequently falling into depression. Lawyers are often considered Maximisers, because the environment in which they work requires them to be. A corollary to this is that lawyers refrain from taking risks, and are resistant to change. The Maximiser and Satisficer dichotomy presents another difficulty during the choice making process. However, Section 2.5 did not attempt to cover all the related psychological interferences. Further dedicated research is needed to gain a better understanding of the psychology of choice making.

6.2.6 Assessing the intensity of regulatory competition

It is often debated whether there is in fact a competition of jurisdictions in a field of law. Theoretical analysis and empirical evidence do not always agree, even in situations where both theoretical and empirical analyses are abundant. It was suggested (Section 2.6) that this might happen in situations of low competitive intensity, with intensity being the product of all the competitive activities (political and legislative activities directed at attracting litigants) along with the size of the demand side and the supply side. All of these factors should be measured during the same period.

The proposed method for measuring the intensity of competition aims at providing a quantifying tool to help researches explain more fully the studies they conduct. Based on this method, and using the data from the empirical studies conducted in Chapter 5, the intensity of the civil justice system competition in the EU ranges from 0.89 to 1.27, where 20 is the maximum.⁷⁹³ The score indicates a low-

⁷⁹³ This score was calculated considering four competing jurisdictions ($n_a = 4$, Germany, the UK, the Netherlands, and France) and twenty-eight potential competitors ($n_p = 28$, all the Member States of the EU). The magnitude of the demand side was considered 0.89. This represents also the ratio of lawyers that consider choice of court important or very important in the survey organised for this research (Question 8, see Section 5.3 for the analysis of this

intensity competition, owing mostly to the low number of EU Member States actively trying to compete.

6.3 Legal bases and relation to harmonisation

6.3.1 Legal bases of choice of court

The number of potential competing jurisdictions is the result of the Brussels I (recast) Regulation. In conjunction with the Rome I and Rome II regulations, the Brussels I (recast) Regulation creates the legal framework within which the civil justice system competition develops.

The Brussels I (recast) Regulation sets the rules for the choice of court in civil and commercial matters, which are cases in which competing jurisdictions try to attract litigants. In particular, civil and commercial matters that involve large disputes or wealthy litigants (the cases mentioned in Chapter 1 are a good examples of this) provide lucrative opportunities for competing jurisdictions. Litigants or potential litigants are allowed ample autonomy to choose the court that best serves their needs. Furthermore, the Regulation does not require any connecting factors between the parties or the conflict and the selected jurisdiction. However, the Regulation restricts party autonomy in order to protect weaker parties or public interest.

In the absence of choice of court, the main rule requires cases against a defendant to be brought before the court where he is domiciled. Some alternatives to this main rule allow claimants certain room for manoeuvre. Given that many international companies conduct business in several EU jurisdictions, claimants might have the possibility of choosing between a number of jurisdictions. This gives rise to what is termed unilateral choice of court, a situation in which only the claimant makes the choice. A bilateral choice of court is one in which both parties (claimant and defendant) make the choice; in practice, many business parties exercise this right to choose the court.

6.3.2 Harmonisation and competition in the EU

Differences between the civil justice systems provide the choice alternatives that parties need during their choice of court. A danger to this is posed by projects to harmonise civil procedure in the EU. Harmonisation, however, is important in the

question, or the Annexes for the detailed results). Political and legislative activities were considered between 7 and 10. The score would still remain low even if the number of competitive activities were increased to 20 (2.54). Evidently, the small size of the supply side is the major influencing factor regarding the low intensity of the civil justice system competition in the EU.

EU context because it reduces differences in legislation, reduces transaction costs, increases legal certainty, and contributes to the perfecting of the internal market. Harmonisation includes a plurality of processes aimed at smoothing differences between legal norms. These processes range from unification to approximation of legislation. Approximation would smooth differences in legislation but not erase them, while unification would do away with any differences.

Eliminating differences between legislations would in effect bring competition to a stop. Nevertheless, Section 3.3 argued that competition would still exist, even in the event of unification, but it would be based on the cultural differences of practitioners and judges, or on differences in the application and interpretation of law and procedures. The same also happens within the same jurisdiction, where local courts have differences in quality, culture, and service, despite using the same law and procedure. Harmonisation, therefore, should be considered as an inhibitor rather than a terminator. The more that harmonisation resembles unification, the more it will slow down competition; and the more that it resembles approximation, the higher the chances that competition will remain unaffected.

6.4 Theoretical analysis of the civil justice system competition in EU

6.4.1 The civil justice system market: party autonomy

There are clear signs that some EU Member States encourage not only companies but also individuals to use their civil justice system. These indications were best described in the examples mentioned in the Introduction (Chapter 1). Such activities create the civil justice system market, with a demand side, a supply side, and a good. The market also relies heavily on party autonomy, which allows natural and legal persons to choose the law that best fits their needs, and even to escape state tutelage and choose the law of private organisations. Party autonomy, however, can be distorted by parties' bargaining power or by information asymmetry. Parties with more bargaining power can impose their choice on those with less, which would distort or suppress the weaker party's autonomy. Information asymmetry can also distort party autonomy, as it allows the better-informed party to be more adept at negotiations. EU regulations, while guaranteeing party autonomy, take care to protect vulnerable parties from distorting elements.⁷⁹⁴ A distorted party autonomy means a malformed market, which is to the detriment of all the actors.

⁷⁹⁴ For example, the Brussels I (recast) Regulation provides special protection to consumers (Art. 17-19) and employees (Art. 20-23). Consumers and employees confront parties with

6.4.2 The civil justice system market: characteristics and incentives

The distinctive behaviour of the civil justice system market is dictated by the presence of certain peculiar characteristics. It is difficult to talk about a price for the civil justice system, as it is composed of several goods for which users should pay separately. Often the price of these goods is not the result of the interaction between demand and supply, but is subsidised by the government. It should be noted here that some jurisdictions, such as England, are considering the introduction of court fees that cover the costs incurred during litigation. However, court fees are dwarfed by the large fees that lawyers charge. The largest part of the price of the civil justice system market is expected to be the fee paid to the lawyer.

Considering that court fees are subsidised by the government, it is natural to conclude that governments are not motivated by direct economic profit to participate in the civil justice system market. Furthermore, governments are atypical suppliers. They do not face the risk of bankruptcy if their judicial system does not respond to the market's needs. Therefore, without any apparent direct benefit and with little risk of bankruptcy, governments should have other incentives to participate and to compete.

Considering that governments subsidise courts, it can be argued that revenue from court fees does provide a direct benefit. Therefore, other incentives to compete should be considered. Looking at the brochures mentioned in Sections 1.1.2 and 5.2, lawyers seem to be very interested in attracting litigants to their jurisdictions. Lawyers are a powerful lobbying group, and are able to influence government policies, and it is suggested that they are one of the incentives for governments to compete for cross-border litigants. Furthermore, Section 4.5 suggested that litigants incur other expenses that increase the government's taxation base. Hence, indirect economic benefits seem to be the reason some jurisdictions try to attract litigants.

6.4.3 Civil justice system as a bundle of goods

The civil justice system is the good where the interests of the demand and supply side converge. It is not a single good, however, but a bundle. Governments act as suppliers of these bundled goods, although in fact their production is spread among different institutions. The bundled goods include laws and institutions that are directed at resolving disputes, and each good has its own function and significance. However, litigants often focus only on the court.

considerable financial power, trade experience, and knowledge, who can distort these parties' autonomy.

Three of the most important goods produced by courts are dispute resolution, law creation, and legal education. The first has a significant value not only for society as a whole but also for some litigants. In fact, only repeat-player litigants would be interested in the other goods, and litigants that are not repeat players would be interested only in dispute resolution.

6.4.4 Competition and the goods

In the public perception, civil justice systems, courts, and court dispute resolution are considered public goods, and are to be understood as being the opposite of private goods, which are excludable and rivalrous. Excludable means that it is economically and practically possible to exclude some or all consumers from using a certain good; rivalrous means that if a consumer uses this good, the quality or quantity of the good deteriorates for other consumers. Public goods lack excludability and rivalry. Courts, however, do not fulfil these criteria. Section 4.2.1.3 suggested that some goods, including courts, are labelled public goods for political purposes. It is in the interest of the government to produce and maintain these goods in conditions such that they resemble public goods. Therefore, although the existence of public goods is not disputed, it is submitted that certain goods are in fact labelled as such for political reasons.

Competition between civil justice systems can instigate a change in a government's attitude, with consequences for the production of public goods. Two scenarios were considered in this analysis. In the first, the demand side is composed mostly of one-shot players: namely, litigants that use the courts only once or incidentally. A demand side with this quality is interested only in the court's dispute resolution, and has little interest in the creation of law or in legal education. Responding to this demand, governments would concentrate courts on the production of dispute resolution, investing other institutions with the creation of law or legal education (Section 4.2.3). Governments would make courts more client oriented, with cost-effective fees and/or proceedings dedicated to cross-border litigants.⁷⁹⁵ Obviously, governments would relax their political objective of labelling courts as public goods, but vulnerable parties that rely on courts for the protection of their rights would suffer, and political pressure would increase. The resulting attitude of governments would depend on the interaction between competitive pressures to make courts more client oriented and on political pressure to maintain courts as public goods. In the second scenario, the demand side is composed of the repeat-player demand: namely, litigants that use the courts

⁷⁹⁵ Competition has pushed some Member States to create special courts to hear cases of cross-border disputes. The Netherlands and England are the best examples. Germany may follow suit. England and the Netherlands have already begun experimenting with cost-effective fees.

often and have an interest in court precedents. This situation does not differ greatly from the first one. Here the courts would be under the same pressure to be client oriented, but this time they should also provide legal education as well as for the creation of laws. While these last two goods would not necessarily increase the price of litigation, they would increase political pressure to maintain courts as public goods.

6.4.5 The demand side: interest and characteristics

The demand side of the civil justice system competition is composed of persons with specific characteristics. These persons should have an interest in past, present, or future disputes, and this interest needs to be directed at choosing the civil justice system of a jurisdiction in order to resolve this dispute. Interest is usually expressed by means of a choice, which in turn is expressed in a written form in contracts or factually by investing a court with resolving a dispute. Choice, therefore, is very important for the quality of the demand side. Any distortions of the ability to choose can have a disruptive effect on the competition itself.

A quintessential characteristic of the demand side is mobility, which allows potential clients to relocate to the jurisdiction of the chosen court and to conduct litigation there, although this mobility faces legislative and non-legislative obstacles. In the EU, however, the Brussels I (recast) Regulation has relatively minimal requirements for the mobility of litigants. Non-legislative obstacles include knowledge, time, and costs. Because limited knowledge regarding choice possibilities hampers mobility, litigants hire lawyers. As professionals, lawyers are expected to have more knowledge, and can therefore increase the mobility of their clients. Nevertheless, hiring a lawyer is costly – especially if extensive international expertise is required – and costs are a factor that restricts mobility. Cross-border litigants are expected to incur costs related to transport and language. Considering this, the typical profile of a cross-border litigant should resemble that of a company or individual with enough economic resources to shoulder the costs of mobility.

6.4.6 Litigants and lawyers

Lawyers do not only increase litigants' mobility – they also provide better litigation opportunities, and create and execute litigation strategies. Lawyers comprise a group of professionals specialised in law, and who exercise considerable power over their clients. This power is such that it allows lawyers to make important decisions, including on the choice of court. The power of lawyers over their clients was also confirmed by data from the survey organised for the present research (Section 4.3.2 and 5.3.4). The power derives from the characteristics of the lawyers market, the characteristics of the service they

provide, and the interaction between lawyers and clients. The legal profession is entropic in reasoning, meaning that the more time that passes, the more law becomes complicated. This means that even repeat players need the assistance of a lawyer in arranging their legal situations. Lawyers' services are a credence good, which means that, in most of the cases, clients cannot assess the quality and the quantity of the service they require. Lawyers themselves decide how much service a client needs. A result of this is that lawyers create a superstar kind of market, where parties are willing to pay a great deal for a small increment in the quality between lawyers. The investment in the client-lawyer relationship is difficult to transfer to another lawyer, which makes it a sunk cost. In addition to this, the market for lawyers has artificial barriers that prevent others from entering. These barriers result in an elite set of lawyers who accumulate large stores of knowledge and finely honed abilities, thus keeping the number of good lawyers small.

The combination of these characteristics gives lawyers the power to influence their clients. As a consequence, the demand side should be considered to be composed of wealthy mobile individuals and companies supported by their lawyers. And because lawyers exercise considerable power in the client-lawyer relationship, they should be considered the party that makes the choice of court.

6.4.7 Supply side: characteristics and components

From a technical point of view, the supply side of the civil justice system competition in the EU is composed of all the Member States. In practice, however, it is composed of all the Member States that demonstrate some sign of competition activity. It is usually the government of these Member States that promotes its jurisdictions and carries out competition activities. However, the civil justice system is a bundle of goods, and each good is created by different producers. Court adjudication is produced by courts; laws and regulations are produced by parliaments; and the general organisation of the system is arranged by the government. These institutions often have different agendas, which collide with the policies of the government and hinder its responses.

As one of the components of the supply side, courts do not share the same incentives to compete. While governments are incentivised by indirect benefits from competition, the only incentive for courts to compete is the personal satisfaction enjoyed by judges who engage in cross-border cases and whose decisions are quoted by foreign colleagues. If these incentives do not exist for courts, their natural predisposition should be to reject the civil justice system competition, whereby they face the risk of having to deal with a heavier workload and with fewer benefits from competition.

As the law making institutions, parliaments also do not have any direct or indirect economic benefits from competition; in addition, they are often dominated by the political forces that are in the government, and they frequently support government policies. However, parliaments have to consider their policies in the light of electoral support. Policies related to the judiciary are sensitive for the electorate, so any competitive activity disapproved of by the electorate is unlikely to be supported by the parliament.

6.4.8 Supply side incentives

As mentioned, direct economic incentives for competing governments are virtually non-existent. In rare cases, competing governments increase fees to cover the costs of special courts involved in competition, meaning that some indirect benefits are those that instigate a government's competitive activities. The legal industry of the competing jurisdictions is relatively important in terms of output and employment (Section 5.2), as its economic presence increases taxation revenue. Lawyers as a lobbying group should be a factor with regard to why governments compete; the brochures promoting England and Wales, or Germany, or continental law were all strongly supported by lawyers (Sections 1.1.2, 4.4.1, and 5.2). Another incentive to compete is the prospect of investment, which requires healthy institutions and a sound judicial system. Promoting the judicial system as healthy and competitive helps not only in attracting litigants but also in attracting investors.

Ultimately, governments have the most difficult task, as they must weigh the benefits and costs of competition, and decide on the best strategy. While costs can be easily calculated, the number of benefits is not clear.

6.4.9 Competition from a unilateral choice of court

Actors of the demand side often have the possibility of making a choice of court, within the limits of the jurisdiction rules, and without the agreement of the other party. These situations give rise to a unilateral choice of court, so named because one party chooses the court, unlike a bilateral choice of court, where both parties agree on the choice. This distinction is important, because choice makers are expected to apply different criteria in both situations.

Section 4.5.1 assumed that the claimant making the choice is interested in winning the case and minimising his costs, in which case from among the jurisdictions available he will choose the one that minimises his costs. The claimant incurs court fee costs, lawyers' fees, costs related to distance, and administration costs. On the basis of the Section 4.5.1.2 analysis, cost-minimising claimants would be interested in courts with low court fees, fast litigation times, short distances, and non-complex procedures.

In another scenario, a claimant would be interested in choosing a court that would maximise the benefits to be had from litigation. Three benefits were considered in the analysis: monetary, moral, and cost shifting. Considering these, a benefit-maximising claimant would be interested in a court that is accurate, fast, and has high cost return coefficients. A court's accuracy depends on how well trained the judges are, on their professionalism, and on their lack of corruption.

Other litigants would like to maximise the utility they derive from litigating in a particular jurisdiction. Utility is the difference between all the possible benefits and all the possible costs. The possibility of having the benefits and incurring the costs in this scenario is equal to the claimant's success ratio, which is the ratio between all the similar cases won by similar claimants and all the similar cases adjudicated by a given court. For a clear and useful success ratio, courts must be consistent, predictable, and not corrupt. While these are general factors in considering a court, a utility-maximising claimant would have to calculate how benefits and costs change in relation to the success ratio. It can be expected that the claimant would choose the court with the highest possible success ratio.

In general, when the choice of court is made only by the claimant, he will choose a court that is near his location, offers fast proceedings, is accurate, offers non-complex procedures, is transparent and predictable, and favours claimants. This analysis assumed that the claimant and his lawyer do not have any differences, and from among all the elements that make up the civil justice system, the claimant takes only the court into account.

6.4.10 Competition from bilateral choice of court

In a bilateral choice of court, two parties choose the court either before or after the conflict, which influences some of the parties' choice preferences. Section 4.5.2 applied the same analysis to the situation involving a unilateral choice of court. Three scenarios were considered: one in which parties try to minimise costs; one in which parties try to maximise benefits; and one in which parties try to maximise utility. Cost-minimising litigants would face the same costs as mentioned above. Two small differences in cost sources can be distinguished between the parties: costs related to distance, and court fees. Assuming that the distance between parties and the court is different, parties will have different preferences for a cost-minimising court. Furthermore, the party that expects to be claimant would also face court fees. Small differences in costs would require parties to negotiate for a compromise cost-minimising court, in which instance parties will agree to pay slightly higher costs in order to find a compromise court.

Benefit-maximising parties would have the same benefit as in the unilateral choice of court analysis. Assuming that the moral benefit of both parties is equal, that it decays over time at the same rate, and that the parties are sure to win, both of them

will be interested in a court that is accurate, fast, and offers high cost-return coefficients. Small differences in benefits between the parties can result in different benefit-maximising courts for both parties. Negotiations to slightly reduce the benefits in order to find a compromise court between the parties can be expected.

For utility-maximising parties, the same reasoning as above should be followed for the costs and benefits component. As regards the success ratio of the court, parties will have different preferences. In situations where parties are not sure of their position in the conflict, they will be equally interested in a neutral court, which is one that favours neither claimants nor defendants. In situations where parties know their position in front of the court, they will be interested in a court that favours their position. The tendency during negotiations, however, would be to find a court that is neutral for both parties, otherwise the negotiations would not proceed.

The distinction between unilateral and bilateral choice of court situations is important for the output of the demand side. If the demand side consists mainly of unilateral choice makers, courts would tend to favour claimants. If it consists mainly of bilateral choice makers, courts would tend to be neutral so that the parties would not object to selecting them. The analysis simplifies real life scenarios to better distinguish the characteristics that parties prefer when making their choice of court. An optimal court should have low court fees, fast proceedings, be located close to the parties, have non-complex procedures, be accurate (quality of judges, experience of judges, independence), and be neutral (transparency and neutrality). Respondents to the survey conducted for this research point out that these elements are indeed the ones that parties consider when choosing a court (Section 5.3). Nevertheless, they have different values and play a different role depending on the case, lawyer, and clients involved.

6.5 An empirical approach to the civil justice system competition

6.5.1 The EU Justice Scoreboard

The EU Justice Scoreboard is an instrument promoted by the European Commission, and its purpose is to organise and compare data on the health of EU Member States' judicial systems. Particular attention is paid to the civil and commercial sections of the courts. Section 5.1.2 analysed the data of the Scoreboard, with the intention of determining which of the Member States scores highest. A good Scoreboard rating is an indication that that Member State's court is comparatively healthy and therefore more competitive than others. The Scoreboard data are challenged by problems of methodology, however, and

therefore the results of this analysis should be viewed with the necessary caveat. Another aim of the analysis was to examine how competing Member States compare with each other and with non-competing Member States.

From the analysis, the best-scoring Member States appear to be Luxembourg, the Netherlands, and Denmark. France is among the Scoreboard's bottom five, and is consistently at the bottom of the table for many of the Scoreboard indicators. Germany and the UK are in the middle and upper-middle part of the classification, respectively. While data from the UK are fragmentary, the low score is mostly because of the score in the quality of justice section. This comes as a surprise, considering that the quality of UK courts is highly regarded. Evidently, the designers of the Scoreboard have different criteria compared to those of lawyers or parties who make a choice of court. Germany scored comparatively low in the efficiency of the justice system parameter, which was surprising, considering that Germany uses efficiency as a leading factor in promoting its courts.

Overall, the Scoreboard analysis provides useful hints with regard to the health of the justice system in these Member States. Taking into account the necessary caveat, it could be concluded that the competing Member States are not necessarily the best jurisdictions in Europe. Some Member States (Luxembourg and Denmark) seem to have strong competitive potential that could be exploited.

6.5.2 Competitive activities

The legal sector is very important for all the Member States surveyed. Data show that in Denmark, Luxembourg, the Netherlands, Germany, England, and France the economic output of the legal sectors was considerable. In addition to this, a considerable workforce is employed in this economic sector. While it is not clear whether competition can bring enough business to justify the effort in every country, for England there are clear indications that cross-border litigations make a considerable contribution in the legal sector.

The competitive activities of Member States can be divided into two groups: legal and non-legal activities. The legal activities observed aim at changing the institutional framework of the justice system, mostly the organisation of courts and the changing of the legal framework, mainly procedural law. England and the Netherlands have created special courts responsible for resolving international commercial disputes, and Germany has long flirted with the idea of having international commercial cases litigated in English. The same idea was implemented with the establishment of the Netherlands Commercial Court. Denmark shows no sign of any competitive activity in the legal field, despite that country's high Scoreboard score. As regards Luxembourg, professional associations promote investing in this jurisdiction, also because of the high quality of its courts. Despite this, the Luxembourgish government seems to be inert, and

no sign of competition is visible. The governments of Germany, England, and to some extent France appear to be more active in promoting their jurisdictions, with England the most active thus far in promoting its courts. Several seminars and activities, jointly organised by the Ministry of Justice and lawyers' associations, have promoted English courts across the globe. Germany maintains a website and promotes its courts and legal system under the motto 'Law Made in Germany'. Promotional activities by the Ministry of Justice of Germany seem to be ongoing, although not as intensively as the English activities.

Competitive activities in the EU seem to be the domain of a small number of Member States, and this small number is responsible for the low intensity of competition in the EU. However, some Member States have considerable potential, and it remains to be seen whether any of them will find the right incentives to enter the market and compete.

6.5.3 Survey

Another element of this study's empirical research was a survey on the choice preferences of lawyers in the EU (Section 5.3). A questionnaire was distributed to lawyers working for the biggest law firms in the EU, with the aim of collecting data on choice of court preferences, the factors considered when making a choice of court, and certain other related topics.

Respondents were mostly partners or senior associates with more than ten years of experience, and all of them had experience with civil and commercial cases. Results from the survey show that lawyers have, on average, experience with 3.23 courts, indicating that lawyers are not familiar with more than three jurisdictions. Limited knowledge and lack of familiarity with other jurisdictions is an obstacle to competition; hence, interested jurisdictions need to promote themselves more actively to lawyers, and to find mechanisms that will render them more attractive. The survey results confirmed that lawyers dominate their clients and most often make the choice of court themselves. Data also show that a large majority of lawyers consider that clients follow their advice in choosing a court, although in other cases, clients leave the choice entirely up to their lawyers.

Respondents consider England and Wales, Germany, and the Netherlands the most attractive jurisdictions for cross-border litigation, while Italy, Romania, and Greece are the least attractive. However, these results contradict the data collected from the Scoreboard. It was expected that the best-scoring jurisdiction would also be the most attractive, but this was not the case, neither for the most attractive nor for the least attractive jurisdictions. The survey asked the respondents to rank the elements that they considered appealing from the jurisdictions they had selected. Results show that respondents found the 'quality of judges and courts', 'predictability of the outcome', and 'familiarity with the jurisdiction' the most

important. These results are consistent with the analysis discussed in Section 4.5. However, these results are slightly inconsistent with the data collected when respondents were asked about their ideal court. In this case, respondents considered ‘quality of judges’, ‘lack of corruption’, and ‘neutrality’ as the most important elements.

Section 5.4 explains some of the discrepancies between the choice preferences of lawyers and the modality with which they make the choice of court. It is suggested that lawyers make their choice in three phases. During the first phase, they create a set of unattractive jurisdictions using the elements mentioned above. In the second phase, they create a set of possible jurisdictions to choose, based on the general elements used to consider a court attractive. At the end of the second phase, lawyers have a set of jurisdictions to be avoided and a list of possible jurisdictions to be chosen. Obviously, there are many jurisdictions outside of these sets. The third phase is the actual choice making, where lawyers choose one or more jurisdictions from the second set, based on the characteristics of the case, the client, or other case-related elements. During negotiations, lawyers will dismiss courts from the first set and negotiate on courts from the second set. If a non-categorised court is offered during negotiations, it is expected that lawyers take time to determine in which category this court is situated. The process described here is often instinctive, as lawyers already know which jurisdiction to avoid and which to favour, based on experience, on anecdotal evidence, or on general opinions about a court. Given that lawyers on average have personal experience with only 3.23 courts, anecdotal evidence or general opinions mould the opinion of lawyers with regard to courts. It is therefore understandable that governments undertake marketing campaigns to promote their jurisdictions.

Results from the survey suggest that lawyers have certain prejudices regarding courts from Eastern Europe and Southern Europe. Courts in both these regions are considered either not reliable or not efficient, and these biases, often unfairly, place some courts in the ‘courts to be avoided’ category. Changing biases and prejudices, however, takes a great deal of time and considerable effort.

In general, the survey showed that lawyers very much like the possibility of choosing a court, although their experience with courts is limited, and in addition they have prejudices regarding certain courts. Nevertheless, they are aware that some EU courts are competing to attract litigants. Among the most attractive courts, respondents mentioned England, Germany, and the Netherlands. The elements that they considered most appealing were the same as those provided in the analysis in Section 4.5. However, more research is needed to better determine how the preferred elements are applied in a choice of court situation.

6.6 Final remarks and further research

The present research demonstrates that the civil justice competition in the EU is a process involving EU institutions, Member States, professional associations, and international commercial parties. The EU guarantees considerable party autonomy such as allowing parties not connected to the EU to litigate in the courts of any Member State. Currently, only a few Member States compete actively to attract litigants, and England is at present the most preferred jurisdiction, despite any visible supremacy in the services it offers. A qualitative empirical research with interviews targeting lawyers and judges would be strongly advised in order to provide more data on this issue. Additionally, more research is needed to determine why some Member States with considerable potential choose not to compete. On the basis of the overview of the competing activities, Member States appear to engage mostly with promotional activities and in few cases with legislative or institutional changes. Legislative or institutional changes, such as the Netherlands Commercial Court, deserve particular attention with regard to how competitive they will be. And developments such as Brexit can radically change the competition landscape in the EU. Future studies should consider the position of England after Brexit, and how this will affect currently competitive Member States or other possible competitors. The research showed that legal business is lucrative, and should motivate more governments to compete for cross-border litigants. However, the number of direct incentives for governments is small. For this reason, incentives for competing, and the moral or economic value of each incentive, should be researched further. It was suggested that professional organisations, mostly lawyers, are the force that drives governments into the civil justice system market. Lawyers are also the real force within the demand side, and their preferences and choices should be addressed by the competing jurisdictions. Ongoing research is needed here. A suggestion for more research was also made regarding the psychology of choice making, as it is an important issue that affects not only lawyers but also the policies of competing governments. This last suggestion remains as a reminder that the civil justice system competition is rich in topics of legal and practical interest.

Summary

This study focuses on the civil justice system competition in the EU, a form of regulatory competition in which states try to attract parties to litigate in their jurisdictions. In this study, the term civil justice system refers to the whole apparatus involved in the resolution and enforcement of civil disputes. Many institutions and parties are engaged in this process, with courts, lawyers, and governments being the obvious examples. In this context, the present study's main research question is 'How do civil justice systems compete in the EU?' To arrive at an answer, both a theoretical and an empirical approach are taken. The theoretical part considers various aspects of competition, but most importantly it offers an overview of regulatory competition, an analysis of the legal framework within which Member States operate, and an analysis of the civil justice system market and its elements. Based on the theoretical analysis, the empirical part is divided into two components; the first contains an analysis of data provided by the 2016 EU Justice Scoreboard, while the second analyses a survey on lawyers' court preferences in the EU that has been conducted for this research. The symbiosis between the theoretical and the empirical part adds more depth to the research, and contributes new data and analyses to the ongoing academic debate.

The study is divided into six chapters. Chapter 1 serves as an introduction to the topic, and presents the research question, certain assumptions made during the study, and the methodology employed. Chapter 2 establishes a framework to be used in the other chapters, focusing in particular on the benefits of competition, regulatory competition in different fields of law, and psychological implications involving choice of court. Chapter 3 offers a brief analysis of the legal framework that facilitates the civil justice system competition in the EU, and the relation between competition and harmonisation. Chapter 4 consists of an analysis of the market, the good, the supply side, and the demand side of the civil justice system. In addition, the chapter analyses the effects of both a unilateral and a bilateral demand on competition. Chapter 5 introduces the methodology and the results of the empirical researches. Chapter 6 presents the conclusions of the study.

In 2007, the Law Society of England and Wales, with the support of the Ministry of Justice of the UK, published 'England and Wales: the jurisdictions of choice', a brochure aimed at promoting the courts of England as the best venues for litigating international commercial cases. The wide support given to this promotional campaign was justified by the large number of cases involving cross-border parties in English courts. In 2010, almost 80% of the cases brought before the Commercial Court in England and Wales involved a foreign litigant. Cross-

border-related cases were an important contributor to the £25.7 billion generated by the legal business in 2015. Lawyers are among the economic beneficiaries of cross-border litigation, which is why they have a vested interest in promoting their jurisdictions. English law firms are among the biggest in the world, eager to expand their business, and always involved in judiciary reforms. The echo of the English brochure resonated in Germany and France, which began similar promotional campaigns. In 2008, Germany initiated the ‘Law Made in Germany’ campaign, which is still ongoing, and advertises German laws and courts as being global, effective, and cost-efficient. Germany’s intention is to promote the use of its legal system by international commercial parties. To this end, proposals were made to allow English as a litigation language for international commercial cases in certain German courts. In early 2017, and in light of the prospects of Brexit, certain interest groups developed a strategy – referred to as the Frankfurt justice Initiative – to promote Frankfurt as a litigation centre. In a similar fashion, France has promoted its own jurisdiction, and has allowed the use of other languages in certain procedures before the Commercial Court of Paris. Among the competing Member States, the Netherlands is less vocal in promoting its jurisdiction, but is quite active in implementing reforms in this direction. The Act on collective settlement of mass damage claims and the Netherlands Commercial Court are considered serious attempts to make the Netherlands a hub for international commercial litigation. It can be argued that there is a trend to step up competitive activities, either because of Brexit or because Member States consider it lucrative, or both.

For commercial cases, the civil justice system competition in the EU is facilitated by the Brussels I (recast) Regulation. The Regulation allows parties to choose the court of any Member State to litigate, regardless of their nationality, domicile, or connection with the court. Party autonomy, however, is limited for the benefit of weaker parties, and for certain issues important for the sovereignty of the state. Within this legal framework, the civil justice system market develops with its own distinctive characteristics, which are a subsidised price, few direct economic motivations, no bankruptcy risk for suppliers, and a close connection with other internal and cross-border markets. What is shared with other markets is the good offered (the civil justice system), which consists of several goods bundled together. Among the bundled goods are courts, legal culture, law and procedures, institutions, and quality of lawyers. This means that parties that make a choice of court are in fact choosing the entire bundle. Competition, however, has the possibility of changing the nature of this good. An intensive competition between jurisdictions would pressure governments to unbundle the goods, and to offer interested parties only the court, as the centrepiece of the civil justice system. This runs the risk of making courts resemble other dispute resolution mechanisms like arbitration and mediation, with consequences for the accessibility of weaker

parties and the transparency of procedures. It also poses the danger of not producing certain goods and services needed in a society, such as legal education and law.

The supply side of the civil justice system market is composed of many actors, whose task is to produce the different goods that are bundled together. However, the government seems to be the leader of the supply side, and the one that promotes changes and advertises the justice system. Governments appear to enjoy certain direct benefits of engaging in the civil justice system competition, but these benefits do not seem to be greater than the costs, which means that governments are motivated by indirect benefits. Among the indirect benefits resulting from competition is a growth in tax revenue, an increase in experience and in the improvement of legislation, and a better image for investors. The demand side of the civil justice system competition is composed of cross-border litigants. Litigating cross-border, however, necessitates some form of mobility, which requires a knowledge of foreign jurisdictions, financial means, and the help of a lawyer. Considering this, a typical cross-border litigant would resemble an individual or company that is financially wealthy and assisted by a lawyer. The analyses show that the lawyer is an important actor on the demand side. Lawyers in fact tend to dominate their clients, and to be the demand side's most effective force. The power of lawyers over their client derives, among others, from the credence good type of service that they provide, the characteristics of the lawyer's market, and the complexity of law. Therefore, in a study of the civil justice system competition, lawyers should be the centre of attention. Answers to the survey conducted for this study were in line with this analysis. Responding lawyers considered that the choice of court decision is made by them, with marginal input from their clients.

The legal framework established by the Brussels I (recast) Regulation provides ample freedom in the choice of courts, which can be made by the bilateral agreement of both parties, or by the unilateral actions of the claimant. If the bilateral choice of court is dominant, the demand side would tend to prefer courts that have less complex procedures, are more predictable, neutral, and transparent. If the unilateral choice of court is dominant, the demand side would tend to prefer courts that have less complex procedures, are more predictable, transparent, and favour the claimant. Obviously, suppliers would tailor their product to fit this demand. Thus, the interaction between the unilateral and the bilateral demand has the potential to shape the behaviour of the supply side. For certain kinds of litigations where a unilateral choice of court is frequent, such as mass litigation, it can be expected that courts would favour the claimant(s). In the event of uncertainty about the unilateral or bilateral choice of court demand, governments

would prefer to offer courts that are neutral, and thus acceptable both for defendants and claimants.

To acquire a better understanding of the demand side, this study conducted empirical research on choice of law preferences by lawyers working for the top one hundred law firms with offices in the European Union. These were the top one hundred in the world, and the top one hundred continental European law firms in terms of revenue. Of the 529 responses, 330 had been completed. The vast majority of the respondents were lawyers working as partners or senior associates, and with more than eleven years of experience. Most of them operated mainly in Germany, the Netherlands, and England, and had had professional experience with an average of 3.23 courts. For an overwhelming number of respondents, English was the language in which they were fully proficient on a professional level, which indicates that English has already established itself as *lingua franca* for lawyer services. Moreover, respondents considered important the possibility of choosing a court, and they very often made use of that opportunity. When asked about jurisdictions, lawyers considered England, Germany, and the Netherlands to be the most attractive, and Italy, Romania, and Greece to be the least attractive. When choosing a jurisdiction, lawyers considered the high quality of judges, lack of corruption, and neutrality the most attractive factors, while corruption, lack of neutrality, and lack of quality of judges were reasons for avoiding a court. These results are similar to the theoretical predictions made about the unilateral and bilateral choice of court, but they are at odds with what the 2016 EU Justice Scoreboard suggests. Compiled by the EU, the Scoreboard is a collection of data on the quality of the judicial system in all the Member States. Using these data, this study created a list of the best-scoring Member States, which were Luxembourg, the Netherlands, Denmark, Estonia, and Austria, with England and Germany trailing in the middle of the list. It is submitted that this happens because lawyers make their choice of court in three phases. In the first phase, lawyers discard unattractive or dangerous jurisdictions (e.g. Italy, Romania, and Greece); in the second phase, they create a list of jurisdictions that are attractive, while discarding unknown jurisdictions; in the third phase, and from among the jurisdictions listed in the second phase, lawyers choose the one (or several) that best serve the needs of the case at hand. The choice in the last phase can be influenced by other factors, such as choice overload, choice maximising behaviour, and choice biases. Some of these biases were exposed by the survey, which found that lawyers have a certain bias in preferring jurisdictions from north-western Europe. It would seem that empirical studies should focus a little more on psychological factors that influence choice of court. The use of longitudinal studies on lawyers' preferences would provide a better perspective regarding long-term choice changes, and possibly connect it with other political or legal developments.

This study shows that certain jurisdictions in the EU are competing to attract litigants, as litigation appears to be a lucrative business. In the market that is created, lawyers are the dominating force on the demand side, while governments act as suppliers. The results of the survey on choice of court preferences indicate that lawyers prefer certain jurisdictions, but often base their choice on factors that are not strictly connected to the properties of the court. Psychological or other interferences, such as choice biases and choice overload, are highly instrumental in the choice of court, and these would justify being given more attention by academics as well as practitioners. Beyond the academic world, this study has practical significance for lawyers and governments alike. The interest demonstrated by partners and senior associates in the survey shows that lawyers have a keen interest in learning more about choice of law preferences and the lessons drawn from it. A similar interest is shared by governments that try to attract litigating lawyers to their jurisdictions; in addition to gaining a better understanding of lawyers' preferences, governments could use the combined theoretical and empirical study as a valuable asset in their policy making.

Samenvatting⁷⁹⁶

Deze studie richt zich op de concurrentie tussen rechtssystemen in civiele zaken in de EU (*'civil justice system competition'*). Dit is een vorm van concurrentie op het gebied van regelgeving, waarin lidstaten partijen proberen aan te trekken om te procederen in hun jurisdicties. In deze studie wordt met de term 'systeem van civiele geschillenbeslechting' (*'civil justice system'*) bedoeld het geheel aan instrumenten dat betrokken is bij het beslechten van civielrechtelijke geschillen. Er zijn veel instituten en partijen betrokken bij dit proces, waarvan rechtbanken, advocaten en overheden in het bijzonder moeten worden genoemd. De onderzoeksvraag van deze studie is: 'Hoe concurreren systemen van civiele geschillenbeslechting in de EU?' Om tot een antwoord te komen, wordt zowel een theoretische als een empirische benadering gehanteerd. Het theoretische deel omvat verschillende aspecten van competitie, maar bovenal geeft het een overzicht van de competitie die er op het gebied van regelgeving bestaat. Daarnaast bevat dit deel een analyse van het wettelijke kader waarbinnen lidstaten opereren en een analyse van de elementen van systemen van civielrechtelijke geschillenbeslechting. Het empirische deel is verdeeld in twee componenten. Het eerste onderdeel bevat een analyse van de data die beschikbaar is gesteld door het *2016 EU Justice Scoreboard*, terwijl het tweede onderdeel een analyse is van een enquête naar de voorkeuren van advocaten voor rechtbanken van de verschillende landen in de EU die voor dit onderzoek is uitgevoerd. Deze combinatie van het theoretische en empirische deel verdiept niet alleen het onderzoek, maar deze nieuwe data en analyse vormen een bijdrage aan het academische debat.

De studie is verdeeld in zes hoofdstukken. Hoofdstuk 1 geeft een inleiding op het onderwerp en presenteert de onderzoeksvraag, de aannames waarop dit onderzoek is gebaseerd en de methodologie. Hoofdstuk 2 verschaft het raamwerk voor de volgende hoofdstukken en gaat in het bijzonder in op de voordelen van concurrentie, concurrentie op het gebied van regelgeving in verschillende rechtsgebieden en de psychologische implicaties van het maken van een forumkeuze. Hoofdstuk 3 bevat een korte analyse van het wettelijke kader dat de concurrentie tussen systemen van civiele geschillenbeslechting in de EU mogelijk maakt en de relatie tussen concurrentie en harmonisering. Hoofdstuk 4 bestaat uit een analyse van de markt, het goed, de aanbodzijde en de vraagzijde van het burgerlijk rechtssysteem. Daarnaast worden de effecten van zowel een unilaterale

⁷⁹⁶ I would like to thank Kyra Hanemaayer for translating this part from English, and Dr. Stefan Philipsen and Prof. Xandra Kramer for editing it.

als een bilaterale vraag op concurrentie geanalyseerd. Hoofdstuk 5 bevat de methodologie en de resultaten van de empirische onderzoeken. Hoofdstuk 6 presenteert de conclusies van de studie.

In 2007 publiceerde *The Law Society of England and Wales*, met steun van het Ministerie van Justitie van het Verenigd Koninkrijk, een brochure genaamd ‘*England and Wales: the jurisdictions of choice*’ ter promotie van de Engelse rechtbanken als de beste plekken om te procederen in internationale handelszaken. De grote steun voor deze promotiecampagne werd gerechtvaardigd door de grote hoeveelheid zaken waarbij grensoverschrijdende partijen betrokken waren in Engelse rechtbanken. In 2010 was bij bijna 80% van de zaken die voor de *Commercial Court* in Engeland en Wales werden gebracht een buitenlandse partij betrokken. Grensoverschrijdende zaken droegen een groot deel bij aan de 25,7 miljard pond die in 2015 door juridische ondernemingen werd gegenereerd. Onder andere advocaten profiteren van de grote hoeveelheid grensoverschrijdende procedures. Zij hebben daardoor belang bij het promoten van hun jurisdicties. Engelse advocatenkantoren behoren tot de grootste kantoren ter wereld. Deze kantoren willen graag uitbreiden en zijn zeer betrokken bij hervormingen van de rechterlijke macht. De echo van de Engelse brochure galmde na in Duitsland en Frankrijk, waar aan soortgelijke promotiecampagnes volgde. In 2008 nam Duitsland het initiatief tot de ‘*Law Made in Germany*’ campagne, die nog steeds wordt voortgezet. Het land adverteert zijn wetten en rechtbanken als internationaal, effectief en kostenefficiënt. De intentie van Duitsland is om het gebruik van zijn juridische systeem te promoten bij internationale handelspartijen. Met het oog op dit doel werden er voorstellen ingediend om het Engels toe te staan als proces taal bij internationale handelszaken in bepaalde Duitse rechtbanken. Begin 2017 ontwikkelden bepaalde interessegroepen, in het licht van de vooruitzichten op de Brexit, een strategie, het *Frankfurt Justice Initiative*, om Frankfurt te promoten als een procescentrum. In Frankrijk werden soortgelijke acties ondernomen door het promoten van de Franse jurisdictie en het toestaan van het gebruik van andere talen bij bepaalde procedures bij de *Commercial Court of Paris*. Hoewel Nederland zijn rechtspraak minder nadrukkelijk promoot dan de andere (en concurrerende) lidstaten, is ook Nederland actief in het implementeren van soortgelijke hervormingen. De Wet collectieve afwikkeling massaschade en de *Netherlands Commercial Court* worden als serieuze pogingen gezien om Nederland een *hub* te maken in de procesvoering bij internationale handelszaken. Een verklaring voor de intensivering van concurrentie tussen lidstaten kan worden gevonden in de ophanden zijnde Brexit, of in de vooronderstelling dat deze concurrentie lucratief zal zijn, of beide.

Voor handelszaken wordt de concurrentie in het systemen van civiele geschillenbeslechting in de EU gestimuleerd door de Brussel I (herschikking) verordening. De Verordening staat partijen toe om een rechtbank te kiezen om te procederen in elk van de lidstaten, ongeacht hun nationaliteit, woonplaats of connecties met de rechtbank. De autonomie van partijen wordt echter beperkt ter bescherming van zwakkere partijen en van publieke belangen. Binnen dit wettelijke kader ontwikkelt de markt van systemen van civiele geschillenbeslechting zich met zijn eigen kenmerken, zoals een gesubsidieerde prijs, weinig directe economische motivatie, geen risico op een faillissement voor aanbieders en een goede verbinding met andere interne en grensoverschrijdende markten. Overeenkomsten met markten zijn vooral gelegen in het feit dat er een goed wordt aangeboden, namelijk het burgerlijk rechtssysteem, dat in feite bestaat uit verschillende goederen in één bundel. Deze gebundelde goederen zijn onder andere gerechten, de juridische cultuur, de regelgeving en procedures, instituties en de kwaliteit van advocaten. Dit betekent dat partijen eigenlijk een heel pakket wanneer zij de keuze maken voor een bepaald gerecht maken. Concurrentie kan de aard van dit goed veranderen. Intensieve concurrentie tussen jurisdicties kan overheden ertoe brengen verschillende goederen uit dit pakket te halen en geïnteresseerde partijen onderdelen van dit pakket, in het bijzonder de gerechte als pure geschillenbeslechtsers, als een apart goed aan te bieden. Het risico hiervan is echter dat rechtbanken in te grote mate zullen gaan lijken op andere geschillenbeslechtingsmechanismes, zoals arbitrage en mediation, wat gevolgen heeft voor de toegankelijkheid voor zwakkere partijen en de transparantie van procedures. Daarnaast is het gevaar hiervan dat bepaalde goederen en diensten die nodig zijn in een maatschappij, zoals juridisch onderwijs en de wet, niet meer geproduceerd zullen worden.

De aanbodzijde van het systeem van civiele rechtspleging bestaat uit veel partijen wier taak het is om de verschillende goederen te produceren die samen worden gebundeld tot één goed. De overheid lijkt daarbij de leider te zijn van de aanbodzijde en degene die met veranderingen adverteert en het rechtssysteem promoot. Overheden genieten bepaalde voordelen van de deelname aan de concurrentie tussen justitiële systemen. Deze voordelen lijken echter niet groter te zijn dan de kosten. De overheid wordt dus gemotiveerd wordt door indirecte voordelen. Onder de indirecte voordelen van de competitie vallen de toename in belastingopbrengsten, toename van ervaring, verbetering van de wetgeving en een beter imago voor investeerders. De vraagzijde van de competitie in het burgerlijk rechtssysteem bestaat uit grensoverschrijdende partijen. Om over de grens te procederen is er een bepaalde vorm van mobiliteit noodzakelijk, wat een bepaalde kennis van buitenlandse jurisdicties vergt, financiële middelen en de hulp van een advocaat. Dit in ogenschouw nemende zou een typische grensoverschrijdende partij een individu of bedrijf zijn met meer dan voldoende financiële middelen en

een advocaat. De analyses laten zien dat de advocaat een belangrijke partij is aan de vraagzijde. Advocaten hebben de neiging om hun cliënten te domineren en zijn daardoor de meest effectieve macht aan de vraagzijde. De macht van advocaten over hun cliënten komt onder andere voort uit het karakter van de dienst (vertrouwensgoed; *credence good*) die zij verschaffen, de karakteristieken van de advocatenmarkt en de complexiteit van de wet. Daarom zouden advocaten in het middelpunt van belangstelling moeten staan in het onderzoek naar de concurrentie tussen systemen van civiele geschillenbeslechting. De uitkomsten van de survey die is gedaan voor deze studie, zijn in overeenstemming met deze analyse. Advocaten die op de enquête reageerden, beschouwden de forumkeuze inderdaad als een keuze die door hen wordt gemaakt, met marginale inspraak van hun cliënten.

Het wettelijke kader dat is vastgesteld door de Brussel I (herschikking) verordening verschaft veel vrijheid om een forumkeuze te maken of het gewenste gerecht te adriëren. Deze keuze kan worden gemaakt door de bilaterale overeenkomst van betrokken partijen of door een unilaterale keuze door de eiser, binnen de grenzen van de alternatieve bevoegdheidsregels. Als de bilaterale forumkeuze dominant is, heeft de vraagzijde de voorkeur voor rechtbanken met minder complexe procedures, die beter voorspelbaar, neutraal en transparant zijn. Als de unilaterale forumkeuze dominant is, heeft de vraagzijde een voorkeur voor rechtbanken met minder complexe procedures, die beter voorspelbaar en transparant zijn en de eiser bevoordelen. Aanbieders passen hun product natuurlijk aan deze vraag aan. De interactie tussen de unilaterale en bilaterale vraag heeft dus de potentie om het gedrag van de aanbodzijde te vormen. Bij bepaalde soorten procesvoeringen waarbij een unilaterale forumkeuze vaak voorkomt, bijvoorbeeld bij massageschillen, kan er worden verwacht dat rechtbanken de eiser(s) bevoordelen. In de situatie waarbij er onzekerheid is over de unilaterale of bilaterale forumkeuze, zouden overheden de voorkeur hebben om neutrale rechtbanken aan te bieden, die acceptabel zijn voor zowel gedaagden als eisers.

Om een beter inzicht te krijgen in de vraagzijde is er voor deze studie een empirisch onderzoek uitgevoerd naar de rechtskeuzevoorkeuren van advocaten werkend bij de top honderd advocatenkantoren in de EU. Deze kantoren vormden de top honderd van de wereld, en de top honderd van de continentaal Europese advocatenkantoren, met betrekking tot de inkomsten. Van de 529 reacties waren 330 surveys volledig ingevuld. De grote meerderheid van de respondenten was advocaat, werkende als partner of *senior associate*, met meer dan elf jaar ervaring. Het grootste deel van hen werkte voornamelijk in Duitsland, Nederland en Engeland en had professionele ervaring met gemiddeld 3,23 rechtbanken. Het overgrote deel van de respondenten beheerst het Engels op een professioneel

niveau, wat aanduidt dat het Engels reeds is gevestigd als lingua franca voor advocatendiensten. Bovendien beschouwden de respondenten forumkeuze als een belangrijke vrijheid en zij maakten vaak gebruik van deze vrijheid. Wanneer de advocaten werd gevraagd naar jurisdicties, beschouwden zij Engeland, Duitsland en Nederland als de meest aantrekkelijke jurisdicties en Italië, Roemenië en Griekenland als de minst aantrekkelijke jurisdicties. De meest aantrekkelijke factoren van een rechtssysteem vonden advocaten de hoge kwaliteit van rechters, de afwezigheid van corruptie, en neutraliteit. De aanwezigheid van corruptie, een gebrek aan neutraliteit en een gebrekkige kwaliteit van rechters waren daarentegen de belangrijkste redenen om een rechtssysteem te vermijden. Deze resultaten zijn vergelijkbaar met de theoretische voorspellingen over de unilaterale en bilaterale forumkeuze, maar ze zijn wel in strijd met wat de *2016 EU Justice Scoreboard* suggereert. Het *2016 EU Justice Scoreboard* is een door de EU samengestelde datacollectie over de kwaliteit van rechtssystemen in alle lidstaten. Gebruikmakende van deze data, heeft deze studie een lijst gecreëerd met de best-scorende lidstaten, namelijk Luxemburg, Nederland, Denemarken, Estland en Oostenrijk, terwijl Engeland en Duitsland achterblijven in het midden van de lijst. Er wordt aangevoerd dat dit zo is, omdat advocaten hun forumkeuze in drie fasen maken. In de eerste fase verwerpen advocaten onaantrekkelijke of gevaarlijke jurisdicties (bijvoorbeeld Italië, Roemenië en Griekenland); in de tweede fase creëren zij een lijst met aantrekkelijke jurisdicties, waarbij ze onbekende jurisdicties verwerpen; in de derde fase kiezen rechters een jurisdictie uit de lijst met de resterende jurisdicties van de tweede fase, die het beste is toegesneden op de behoeften van hun zaak. De keuze in de laatste fase kan tevens door andere factoren worden beïnvloed, zoals een overdaad aan keuze, keuze maximaliserend gedrag en keuze *biases*. Sommige van deze *biases* zijn blootgelegd door het onderzoek, waarin werd gevonden dat advocaten een zekere *bias* hebben naar jurisdicties van Noordwest-Europa. Empirische studies zouden meer moeten focussen op psychologische factoren die de forumkeuze beïnvloeden. Het gebruik van longitudinale studies naar de voorkeuren van advocaten zou een beter inzicht kunnen geven in de lange termijn veranderingen van keuzes en zou de voorkeuren mogelijk kunnen verbinden met andere politieke of juridische ontwikkelingen.

Deze studie laat zien dat bepaalde jurisdicties in de EU concurreren om procederende partijen aan te trekken, omdat procederen een winstgevende bedrijfsvoering kan zijn. In de gecreëerde markt zijn advocaten de overheersende partij aan de vraagzijde en overheden gedragen zich als aanbieders. De resultaten van het onderzoek naar voorkeuren in forumkeuze geven aan dat advocaten bepaalde jurisdicties prefereren, maar hun keuze is vaak gebaseerd op factoren die niet strikt verbonden zijn met eigenschappen van het gerecht. Psychologische of andere factoren, zoals keuze *biases* en een overdaad aan keuze, hebben een

grote invloed op de forumkeuze en er zou daarom meer aandacht aan deze verstoringen moeten worden gegeven door zowel academici als mensen uit de praktijk. Ook buiten de academische wereld is deze studie van grote praktische betekenis voor advocaten en overheden. Uit de resultaten van dit onderzoek blijkt dat advocaten veel interesse hebben om meer kennis te vergaren over de voorkeuren bij forumkeuzes en de implicaties ervan. Deze interesse wordt gedeeld door overheden die proberen om procespartijen aan te trekken naar hun jurisdicties. Naast een beter begrip van de voorkeuren van advocaten, zouden overheden deze gecombineerde theoretische en empirische studie kunnen gebruiken voor beleidsvorming.

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Annexes

Calculating a score from the Scoreboard

Tab 1: Length of proceedings				
	Figure 4	Figure 5	Figure 6	Total
LU	n/a	2	n/a	2
EE	2	3	4	3
AT	n/a	4	n/a	4
BG	7	n/a	3	5
DK	1	10	n/a	5.5
HU	5	6	6	5.666667
LT	6	1	13	6.666667
NL	8	5	8	7
PL	4	12	5	7
SE	11	8	2	7
SI	9	13	1	7.666667
RO	13	7	10	10
FI	10	15	11	12
LV	16	14	7	12.333333
DE	n/a	11	14	12.5
CZ	14	9	17	13.333333
ES	18	16	15	16.333333
FR	19	18	12	16.333333
HR	12	19	18	16.333333
EL	n/a	17	n/a	17
SK	17	21	16	18
BE	n/a	n/a	19	19
IT	20	22	20	20.666667
MT	21	23	22	22
CY	24	n/a	23	23.5
IE	n/a	n/a	n/a	n/a
PT	n/a	n/a	n/a	n/a
UK	n/a	n/a	n/a	n/a

Tab 2: Clearance rate				
	Figure 7	Figure 8	Figure 9	Total
IT	3	1	2	2
RO	2	6	1	3
EL	n/a	4	n/a	4
LV	4	5	5	4.666667
SI	5	2	9	5.333333
SE	7	11	10	9.333333
MT	10	15	4	9.666667
FI	9	8	14	10.33333
HR	6	3	23	10.66667
BG	11	n/a	11	11
HU	8	9	18	11.66667
AT	n/a	13	n/a	13
ES	14	19	7	13.33333
DE	n/a	16	12	14
SK	12	24	6	14
DK	16	14	n/a	15
PL	13	17	15	15
CZ	20	7	19	15.33333
CY	23	n/a	8	15.5
EE	18	10	20	16
NL	17	18	13	16
LU	n/a	22	17	19.5
FR	22	23	16	20.33333
LT	19	21	21	20.33333
BE	n/a	20	22	21
IE	24	25	n/a	24.5
PT	n/a	n/a	n/a	n/a
UK	n/a	n/a	n/a	n/a

Tab 3: Pending cases				
	Figure 10	Figure 11	Figure 12	Total
LU	n/a	2	n/a	2
HU	4	8	2	4.666667
BG	3	n/a	8	5.5
AT	n/a	6	n/a	6
EE	5	7	7	6.333333
DK	9	5	n/a	7
LV	6	11	4	7
SE	2	3	16	7
NL	7	4	13	8
FI	10	1	18	9.666667
PL	16	12	3	10.33333
PT	n/a	n/a	11	11
LT	8	10	17	11.66667
CZ	15	15	6	12
MT	11	17	9	12.33333
RO	14	19	5	12.66667
FR	12	18	10	13.33333
BE	n/a	n/a	15	15
DE	n/a	9	21	15
ES	13	13	19	15
EL	n/a	16	n/a	16
SI	23	14	12	16.33333
HR	22	23	14	19.66667
CY	18	n/a	22	20
SK	19	21	n/a	20
IT	20	22	20	20.66667
IE	n/a	n/a	n/a	n/a
UK	n/a	n/a	n/a	n/a

Tab 4: Efficiency of justice system	
	Total
BG	7.166667
HU	7.333333
AT	7.666667
SE	7.777778
LV	8
EE	8.444444
RO	8.555556
DK	9.166667
SI	9.777778
NL	10.333333
FI	10.666667
LU	10.75
PL	10.777778
PT	11
EL	12.333333
LT	12.88889
CZ	13.55556
DE	13.833333
IT	14.44444
MT	14.66667
ES	14.88889
HR	15.55556
FR	16.66667
SK	17
BE	19
CY	19.66667
IE	24.5
UK	n/a

Tab 5: Accessibility							
	Figure 18	Figure 21	Figure 23	Figure 24	Figure 25	Figure 26	Total
AT	1	1	1	1	5.5	21	5.083333
BE	1	4.75	4.75	1	1	18	5.083333
BG	1	5	3	1	1	4	2.5
CY	4	5	5	8	3.5	23	8.083333
CZ	3	1	1	2	5	24	6
DE	1	3	2	1	3	9	3.166667
DK	1	3	2	1	1	19	4.5
EE	1	1	1	1	1	13	3
EL	4	4.75	4	7	6	26	8.625
ES	1	1	1	1	1	2	1.166667
FI	1	1	1	1	3	16	3.833333
FR	2	5	2.75	5	5.5	20	6.708333
HR	1	5	5	2	3	12	4.666667
HU	2	2	2	1	1	6	2.333333
IE	1	4	2	2	1	14	4
IT	2	3.25	2.75	8	3	15	5.666667
LT	1	1	5	1	1	11	3.333333
LU	2	5	1	1	2.5	17	4.75
LV	1	1	1	1	1	5	1.666667
MT	3	4	1	7	1	7	3.833333
NL	1	4	5	1	1	3	2.5
PL	n/a	3.75	3	n/a	n/a	n/a	3.375
PT	1	2.25	1	6	3	22	5.875
RO	1	1	1	1	1	10	2.5
SE	1	3	1	7	3	25	6.666667
SI	1	3	3	4	2	8	3.5
SK	2	1	5	2	1	1	2
UK	n/a	n/a	n/a	n/a	n/a	n/a	n/a

Tab 6: Resources							
	Figure 28	Figure 30	Figure 33	Figure 34	Figure 35	Figure 37	Total
AT	5	15	21	5	14	2	10.33333
BE	8	18	11	4	18	3	10.33333
BG	24	4	10	5	8	2	8.833333
CY	28	23	4	6	25	7	15.5
CZ	21	5	19	5	26	1	12.83333
DE	3	11	9	3	17	1	7.333333
DK	13	26	13	5	13	4	12.33333
EE	26	17	23	3	3	2	12.33333
EL	16	12	1	2	20	6	9.5
ES	12	21	6	3	12	1	9.166667
FI	7	16	27	6	15	1	12
FR	14	24	20	2	28	2	15
HR	18	2	16	5	11	3	9.166667
HU	23	6	12	2	24	1	11.33333
IE	11	27	8	2	2	5	9.166667
IT	9	22	3	5	10	3	8.666667
LT	25	8	24	3	5	1	11
LU	1	3	2	5	23	1	5.833333
LV	20	10	25	4	4	1	10.66667
MT	15	25	5	6	22	7	13.33333
NL	6	19	17	1	9	1	8.833333
PL	17	7	14	4	27	n/a	13.8
PT	19	14	7	2	19	1	10.33333
RO	27	13	18	4	7	1	11.66667
SE	4	20	26	6	6	1	10.5
SI	10	1	22	4	1	1	6.5
SK	22	9	15	5	16	7	12.33333
UK	2	n/a	n/a	n/a	21	n/a	11.5

Tab 7: Quality of justice systems

	Total
SI	5
ES	5.166667
DE	5.25
LU	5.291667
NL	5.666667
BG	5.666667
LV	6.166667
IE	6.583333
HU	6.833333
HR	6.916667
RO	7.083333
LT	7.166667
IT	7.166667
SK	7.166667
EE	7.666667
AT	7.708333
BE	7.708333
FI	7.916667
PT	8.104167
DK	8.416667
SE	8.583333
MT	8.583333
EL	9.0625
CZ	9.416667
PL	10.82143
FR	10.85417
UK	11.5
CY	11.79167

Tab 8: Independence				
	Figure 44	Figure 46	Figure 48	Total
FI	2	1	1	1.333333
DK	1	2	2	1.666667
IE	5	4	4	4.333333
LU	6	3	5	4.666667
NL	7	5	3	5
SE	3	10	7	6.666667
UK	8	6	6	6.666667
DE	9	7	9	8.333333
AT	4	11	11	8.666667
EE	10	8	10	9.333333
BE	11	14	8	11
FR	13	13	12	12.66667
CY	12	15	14	13.66667
MT	20	9	13	14
RO	14	12	19	15
CZ	17	18	16	17
LT	16	16	20	17.33333
PL	19	19	17	18.33333
EL	18	17	21	18.66667
PT	22	20	15	19
HU	15	22	22	19.66667
LV	21	21	18	20
ES	23	23	24	23.33333
SI	24	24	25	24.33333
IT	26	26	23	25
HR	25	25	26	25.33333
BG	27	27	27	27
SK	28	28	28	28

Tab 9: Final Scoreboard score	
	Total
LU	6.977273
NL	7.5
DK	7.791667
EE	8.111111
AT	8.166667
FI	8.333333
UK	8.428571
SE	8.592593
IE	8.631579
HU	8.689655
LV	8.814815
DE	9.125
RO	9.142857
SI	9.310345
BG	9.5
LT	10.42857
BE	10.75
PT	11.05952
ES	11.37931
MT	11.57692
IT	12.34483
HR	12.35714
EL	12.67045
CZ	12.89286
PL	12.94565
FR	13.1875
SK	13.73077
CY	14.54348

List of law firms included in the study

Top 100 Law firms in Europe in 2014 ⁷⁹⁷				
	Firm	Revenue (€m)	Country	offices in the EU
1	Garrigues	331.9	Spain	PL, BE, UK, ES, PT
2	Fidal	322.6	France	FR
3	Loyens & Loeff	289.3	Netherlands	NL, BE, UK, LU, FR
4	Cuatrecasas Gonçalves Pereira	248	Spain	ES, PT, BE, UK, FR,
5	Hengeler Mueller	226.8	Germany	DE, BE, UK
6	Gide Loyrette Nouel	192.5	France	BE, FR, HU, PL, UK
7	Noerr	190.8	Germany	DE, SK, HU, RO, CZ, PL, ES, BE, UK
8	Uría Menéndez	185.46	Spain	ES, BE, UK
9	Gleiss Lutz	166	Germany	DE, BE
10	Roedl & Partner	155.9	Germany	AT, BG, HR, CY, CZ, EE, FI, FR, DE, HU, IT, LV, LT, PL, RO, SK, SI, ES, SE, UK

⁷⁹⁷ The list was obtained from The Lawyer. The link used to obtain the 2014 list has been replaced with the 2016 list. The 2014 list <<http://www.thelawyer.com/analysis/intelligence/european-100-2014/european-100-2014-ranking/>>, the 2016 list <<http://reports.thelawyer.com/reports/european-100-2016/>>.

11	Bonelli Erede Pappalardo	151	Italy	IT, BE, UK
12	NautaDutilh	150	Netherlands	NL, BE, UK, LU
13	Stibbe	136	Netherlands	NL, BE, UK
14	De Brauw Blackstone Westbroek	133	Netherlands	NL, UK, BE,
15	Chiomenti Studio Legale	130.3	Italy	IT, UK, BE
16	Mannheimer Swartling	124.5	Sweden	SE, DE, BE
17	Kromann Reumert	120	Denmark	DK, UK
18	Egorov Puginsky Afanasiev & Partners ⁷⁹⁸	119.2	Russia	
19	Arthur Cox	114.5	Ireland	IE, UK
20	Heuking Kühn Lüer Wojtek	107.6	Germany	DE, BE,
21	Gianni Origoni Grippo Cappelli & Partners	107	Italy	IT, BE, UK
22	Bech-Bruun	107	Denmark	DK
23	A&L Goodbody	105.4	Ireland	IE, UK
24	McCann FitzGerald	103.5	Ireland	IE, UK, BE
25	Houthoff Buruma	102	Netherlands	NL, BE, UK
26	Matheson	101.4	Ireland	IE, UK
27	Flick Gocke Schaumberg	100.5	Germany	DE, AT

⁷⁹⁸ Law firms in *italics* were not included in the target population for the survey.

28	Arendt & Medernach	99	Luxembourg	LU, UK
29	Wikborg Rein	94.3	Norway	
30	Luther	92.6	Germany	DE, BE, UK, LU
31	Vinge	92.3	Sweden	BE, SE
32	Plesner	90	Denmark	DK
33	Goerg	84.4	Germany	DE
34	Thommessen	83	Norway	
35	Bredin Prat	81.9	France	FR, BE
36	Lenz & Staehelin	80.5	Switzerland	
37	Beiten Burkhardt	80	Germany	DE, BE
38	NCTM	77	Italy	IT, BE, UK
39	Elvinger Hoss & Prussen	75.7	Luxembourg	LU
40	Gorrissen Federspiel	74.5	Denmark	DK
41	Schjødt	73.2	Norway	
42	Wolf Theiss	70	Austria	AT, BG, HR, CZ, HU, PL, RO, SK, SI
43	Baer & Karrer	70	Switzerland	
44	Wiersholm	69.9	Norway	
45	Homburger	69.7	Switzerland	
46	Schellenberg Wittmer	68.9	Switzerland	
47	Lindahl	68.9	Sweden	SE
48	William Fry	68.5	Ireland	IE, UK
49	BA-HR	67	Norway	

50	Schoenherr	66.7	Austria	AT, BE, BG, HR, CZ, HU, PL, RO, SK, SI
51	Roschier	63.6	Finland	FI, SE
52	Lett	61.7	Denmark	DK
53	Gómez-Acebo & Pombo	60.7	Spain	ES, BE, PT, UK
54	Schultze & Braun	59.4	Germany	DE, FR, UK
55	Hannes Snellman	57.5	Finland	FI, SE
56	Capstan	53.3	France	FR
57	Liedekerke Wolters Waelbroeck Kirkpatrick	52.6	Belgium	BE, UK
58	Setterwalls	52.6	Sweden	SE
59	Legance	51.8	Italy	IT, UK
60	P+P Pollath + Partners	51.5	Germany	DE
61	GSK Stockmann + Kollegen	50.2	Germany	DE, BE
62	De Pardieu Brocas Maffei	50.1	France	FR
63	Darrois Villey Maillot Brochier	50	France	FR
64	Arntzen de Besche	48.5	Norway	
65	Mason Hayes & Curran	48	Ireland	IE, UK
66	Niederer Kraft & Frey	47.5	Switzerland	
67	Walder Wyss	45	Switzerland	

68	Cremades & Calvo-Sotelo	43	Spain	ES
69	Roca Junyent	42.8	Spain	ES
70	August & Debouzy	42.4	France	FR, BE
71	Selmer	42.2	Norway	
72	Castren & Snellman	40.7	Finland	FI
73	Kappellmann und Partner	40	Germany	DE, BE
74	FPS	39.9	Germany	DE
75	Jeantet Associés	39	France	FR, LU
76	Delphi	39	Sweden	SE
77	Buse Heberer Fromm	38.8	Germany	DE, BE, UK, IT, ES, FR
78	Steenstrup Stordrange	38.3	Norway	
79	Pestalozzi	38.1	Switzerland	
80	Haavind	37.9	Norway	
81	MLGTS	37.7	Portugal	PT
82	Fromont-Briens	37	France	FR
83	Borenus	35.7	Finland	FI
84	Kluge	35.6	Norway	
85	Vieira de Almeida & Associados	35	Portugal	PT
86	Vischer	34.4	Switzerland	
87	Eubelius	34.1	Belgium	BE
88	Dillon Eustace	33.6	Ireland	IE
89	CHSH	33.4	Austria	AT, SK, RO, CZ, BG

90	Boekel de Nerée	33.1	Netherlands	NL, UK
91	De Gaulle Fleurance & Associes	33	France	FR, BE
92	PLMJ	33	Portugal	PT
93	Graf von Westphalen	32.7	Germany	DE, BE
94	UGGC	32	France	FR, BE
95	Bruun & Hjejle	31.9	Denmark	DK
96	Krogerus	31.5	Finland	FI
97	Racine	30.5	France	FR, BE
98	SKW Schwarz	30.5	Germany	DE
99	MAQS	30.4	Sweden	SE
100	Pavia e Ansaldo	30	Italy	IT, BE

Top 100 Law firms in the world in 2014 ⁷⁹⁹				
	Firm	Revenues	Country with the most lawyers	Offices in the EU
1	Baker & McKenzie	\$2,540,000,000	United States	AT, BE, CZ, FR, DE, HU, IT, LU, NL, PL, ES, SE, UK
2	DLA Piper	\$2,481,000,000	United States	AT, BE, CZ, FR, DE, HU, IT, LU, NL, PL, RO, SK, ES, UK
3	Latham & Watkins	\$2,285,000,000	United States	BE, FR, DE, IT, ES, UK
4	Skadden, Arps, Slate, Meagher & Flom	\$2,235,000,000	United States	BE, DE, UK, FR
5	Clifford Chance	\$2,125,500,000	United Kingdom	BE, CZ, FR, DE, IT, LU, NL, PL, RO, ES, UK
6	Kirkland & Ellis	\$2,016,000,000	United States	UK, DE
7	Linklaters	\$1,963,000,000	United Kingdom	BE, FR, DE, IT, NL, PL, ES, SE, UK
8	Allen & Overy	\$1,930,500,000	United Kingdom	BE, CZ, FR, DE, GR, HU, IT, LU, NL,

⁷⁹⁹ The American lawyer (2014) 104.

				PL, RO, SK, ES, UK
9	Freshfields Bruckhaus Deringer	\$1,927,000,000	United Kingdom	AT, BE, FR, DE, IT, ES, UK
10	Norton Rose Fulbright	\$1,904,000,000	United States	BE, DE, FR, GR, IT, PL, NL, UK
11	Jones Day	\$1,766,000,000	United States	BE, UK, FR, ES, NL, DE, IT
12	Hogan Lovells	\$1,717,500,000	United States	BE, HR, FR, DE, LU, HU, IT, NL, PL, ES, UK,
13	Sidley Austin	\$1,601,000,000	United States	BE, UK
14	White & Case	\$1,440,000,000	United States	DE, SK, BE, RO, HU, FI, UK, ES, IT, FR, CZ, SE, PL
15	Gibson, Dunn & Crutcher	\$1,386,500,000	United States	BE, DE, FR, UK
16	Morgan, Lewis & Bockius	\$1,291,000,000	United States	BE, DE, FR, UK
17	Sullivan & Cromwell	\$1,278,000,000	United States	DE, UK, FR
18	Dentons	\$1,261,500,000	United States	BE, CZ, FR, DE, HU, PL, RO, SK, ES, UK

19	Herbert Smith Freehills	\$1,251,500,000	Australia	IE, BE, DE, UK, ES, FR
20	Greenberg Traurig	\$1,230,500,000	United States	NL, UK, PL
21	Cleary Gottlieb Steen & Hamilton	\$1,190,000,000	United States	FR, BE, UK, DE, IT
22	K&L Gates	\$1,159,000,000	United States	UK, DE, BE, IT, FR, PL
23	Mayer Brown	\$1,146,000,000	United States	BE, DE, UK, FR
24	Weil, Gotshal & Manges	\$1,137,000,000	United States	HU, FR, UK, DE, CZ, PL
25	Simpson Thacher & Bartlett	\$1,128,500,000	United States	UK
26	CMS Legal Services	\$1,118,500,000	Germany	AT, BE, BG, HR, CZ, FR, DE, HU, IT, LU, NL, PL, PT, RO, SK, SI, ES, UK
27	Reed Smith	\$1,075,000,000	United States	FR, UK, DE, GR
28	Wilmer Cutler Pickering Hale and Dorr	\$1,073,000,000	United States	DE, BE, UK,
29	King & Wood Mallesons	\$1,020,000,000	China	BE, FR, DE, , IT, LU, ES, UK
30	Morrison & Foerster	\$1,011,000,000	United States	DE, BE, UK
31	Ropes & Gray	\$997,500,000	United States	UK

32	Davis Polk & Wardwell	\$975,000,000	United States	UK, FR, ES
33	Quinn Emanuel Urquhart & Sullivan	\$972,500,000	United States	BE, DE, FR, UK
34	Paul Hastings	\$941,000,000	United States	BE, DE, FR, UK, IT
35	Paul, Weiss, Rifkind, Wharton & Garrison	\$934,500,000	United States	UK
36	Ashurst	\$916,500,000	Australia	BE, DE, UK, IT, ES, FR, SE
37	McDermott Will & Emery	\$881,000,000	United States	BE, DE, UK, IT, FR
38	Orrick, Herrington & Sutcliffe	\$867,500,000	United States	DE, BE, UK, IT, FR
39	King & Spalding	\$861,500,000	United States	DE, UK, FR
40	Akin Gump Strauss Hauer & Feld	\$828,500,000	United States	DE, UK
41	Shearman & Sterling	\$820,500,000	United States	BE, FR, DE, IT, UK
42	Dechert	\$777,000,000	United States	BE, IE, DE, UK, LU, FR
43	Squire Sanders	\$775,500,000	United States	BE, DE, SK, HU, UK, ES, FR, CZ, PL
44	Proskauer Rose	\$768,500,000	United States	UK, FR

45	Bingham McCutchen	\$762,000,000	United States	dissolved ⁸⁰⁰
46	Goodwin Procter	\$752,500,000	United States	UK
47	Winston & Strawn	\$741,000,000	United States	BE, FR, UK
48	O'Melveny & Myers	\$733,000,000	United States	BE, UK
49	Milbank, Tweed, Hadley & McCloy	\$706,000,000	United States	DE, UK
50	Debevoise & Plimpton	\$688,000,000	United States	DE, FR, UK
51	Arnold & Porter	\$686,000,000	United States	BE, UK
52	Alston & Bird	\$675,000,000	United States	BE
53	Cooley	\$674,000,000	United States	UK
54	Covington & Burling	\$657,000,000	United States	BE, UK
55	Slaughter and May	\$645,500,000	United Kingdom	BE, UK
56	Foley & Lardner	\$644,000,000	United States	BE
57	Bryan Cave	\$643,000,000	United States	DE, FR, UK
58	Perkins Coie	\$635,500,000	United States	_ ⁸⁰¹

⁸⁰⁰ By the time the survey was distributed, this law firm was dissolved.

⁸⁰¹ Shows that the law firm did not have offices in any EU Member State by the time the survey was distributed.

59	Vinson & Elkins	\$630,500,000	United States	UK
60	Holland & Knight	\$627,000,000	United States	-
61	Cravath, Swaine & Moore	\$614,000,000	United States	UK
62	McGuireWoods	\$609,500,000	United States	BE, UK
63	Wachtell, Lipton, Rosen & Katz	\$601,000,000	United States	-
64	Eversheds	\$597,000,000	United Kingdom	AT, BE, EE, FI, FR, DE, HU, IE, IT, LV, LT, NL, PL, RO, ES, SE, UK
65	Baker Botts	\$586,000,000	United States	BE, UK
66	Wilson Sonsini Goodrich & Rosati	\$575,000,000	United States	BE
67	Clyde & Co	\$571,000,000	United Kingdom	GR, ES, FR, UK
68	Willkie Farr & Gallagher	\$559,000,000	United States	FR, UK, DE, IT
69	Hunton & Williams	\$545,000,000	United States	UK, BE
70	Pillsbury Winthrop Shaw Pittman	\$543,500,000	United States	UK
71	Baker & Hostetler	\$540,000,000	United States	-
71	Seyfarth Shaw	\$540,000,000	United States	UK

73	Katten Muchin Rosenman	\$506,000,000	United States	UK
74	Pinsent Masons	\$505,000,000	United Kingdom	UK, DE, FR
75	Littler Mendelson	\$487,000,000	United States	-
76	Cadwalader, Wickersham & Taft	\$481,500,000	United States	UK, BE
77	Sheppard, Mullin, Richter & Hampton	\$466,500,000	United States	UK, BE
78	Fried, Frank, Harris, Shriver & Jacobson	\$458,500,000	United States	DE, FR, UK
79	Faegre Baker Daniels	\$452,000,000	United States	UK
80	J&A Garrigues	\$441,000,000	Spain	-
81	McCarthy Tétrault	\$439,000,000	Canada	UK
82	Minter Ellison	\$435,000,000	Australia	UK
83	Fidal	\$428,500,000	France	-
84	Duane Morris	\$421,500,000	United States	UK
85	Simmons & Simmons	\$420,000,000	United Kingdom	BE, FR, DE, IT, LU, PT, ES, NL, UK
86	Locke Lord	\$415,000,000	United States	UK
87	Allens	\$414,000,000	Australia	-
88	Nixon Peabody	\$411,500,000	United States	UK

89	Venable	\$409,500,000	United States	-
90	Bird & Bird	\$406,000,000	United Kingdom	BE, CZ, DK, FI, FR, DE, HU, IT, NL, PL, ES, SE, UK
91	Clayton Utz	\$405,000,000	Australia	-
92	Hughes Hubbard & Reed	\$396,000,000	United States	FR
93	Troutman Sanders	\$394,000,000	United States	-
94	Schulte Roth & Zabel	\$389,000,000	United States	UK
95	Kilpatrick Townsend & Stockton	\$388,500,000	United States	SE
96	Drinker Biddle & Reath	\$388,000,000	United States	-
97	Fragomen, Del Rey, Bernsen & Loewy	\$387,000,000	United States	BE, FR, DE, UK
98	Cahill Gordon & Reindel	\$386,500,000	United States	UK
99	Berwin Leighton Paisner	\$385,500,000	United Kingdom	BE, FR, DE,
100	Loyens & Loeff	\$384,000,000	Netherlands	-

Survey results

Q1: What is your current job position in your law firm?				
Answer Options	Completed		Including uncompleted	
Junior Associate	7.3%	24	7.9%	42
Associate	16.7%	55	18.3%	97
Senior Associate	27.0%	89	27.0%	143
Partner	40.6%	134	36.7%	194
Counsel	5.5%	18	6.0%	32
Of Counsel	1.5%	5	2.3%	12
Other (please specify)	1.5%	5	1.7%	9
		330		529

Q2: What field of law do you work in?			
Completed		Uncompleted	
Corporate	54	Corporate	81
Litigation	39	Litigation	63
M&A	38	M&A	60
IP Law	27	Commercial	49
Finance	26	Arbitration	34
Banking	22	Dispute Resolution	25
Dispute Resolution	15	Tax	25
Insolvency	15	Banking Finance	23
Energy	14	Insolvency	23
Competition Law	13	Employment	19
Real Estate	11	Energy	19
Tax	11	Real Estate	18
Commercial Law	10	Financial	15
Construction	8	Construction	12
International Arbitration	7	Capital Markets	11
Financial Institutions	5	Insurance	9
Regulatory Law	5	Private Equity	6
Insurance	5	Public Procurement	5
Labour Law	4	Liability	5
	329		502

Q3: In which official languages of the EU do you have full professional proficiency?		
	Responses	Controlled for home jurisdiction
English	466	406
German	166	29
French	94	44
Dutch	89	0
Swedish	55	13
Danish	45	3
Spanish	36	13
Italian	32	15
Finnish	24	2
Romanian	14	2
Hungarian	9	1
Portuguese	10	2
Polish	9	2
Bulgarian	7	0

Q4: In which jurisdiction(s) did you graduate?				
	Bachelor	Master	Doctoral	Other
Germany	64	55	56	28
Netherlands	42	49	10	8
United Kingdom	24	47	3	17
Denmark	23	23	0	0
Sweden	23	19	0	3
France	17	20	4	15
Spain	15	8	1	1
Ireland	11	4	0	0
Italy	11	6	5	4
Austria	8	9	4	4
Belgium	7	10	1	2
Finland	7	8	0	2
Portugal	6	4	0	0
Romania	6	4	0	1

USA	5	20	3	23
Hungary	4	3	3	0
Australia	3	2	0	3
Poland	3	4	2	1
Bulgaria	2	2	0	0
China	1	0	0	1
Japan	1	0	0	0
Malta	1	0	1	0
Moldova	1	1	1	0
Canada	0	1	0	2
Czech Republic	0	1	1	0
Singapore	0	1	0	0
Switzerland	0	1	0	1
Iceland	0	0	0	1
Israel	0	0	0	1
Luxembourg	0	0	0	1
New Zealand	0	0	0	1
	285	302	95	120

Q5: In which jurisdiction in the European Union do you mainly operate?		
Germany	28.48%	94
Netherlands	13.94%	46
England and Wales ⁸⁰²	8.48%	28
Denmark	7.27%	24
Sweden	7.27%	24
Spain	4.85%	16
France	3.94%	13
Austria	3.64%	12
Ireland	3.64%	12
Finland	2.73%	9
Italy	2.73%	9
Belgium	2.42%	8
Luxembourg	2.42%	8

⁸⁰² England and Wales were two separate options in the Questionnaires, United Kingdom (England) and United Kingdom (Wales) respectively. The results from these answers we combined together into England and Wales.

Romania	2.12%	7
Hungary	1.52%	5
Portugal	1.52%	5
Poland	1.21%	4
Bulgaria	0.91%	3
Czech Republic	0.30%	1
Greece	0.30%	1
Scotland	0.30%	1
Cyprus	0.00%	0
Croatia	0.00%	0
Estonia	0.00%	0
Latvia	0.00%	0
Lithuania	0.00%	0
Malta	0.00%	0
Slovakia	0.00%	0
Slovenia	0.00%	0
		330

Q6: With which EU Member States' court(s) do you have a professional experience?

	Completed Questionnaires		Uncompleted Questionnaires	
	Controlled	Response	Controlled	Response
Germany	63	157	85	205
England and Wales ⁸⁰³	115	143	153	196
Netherlands	47	93	66	145
France	73	86	100	125
Austria	48	60	63	80
Spain	39	55	54	77
Belgium	46	54	55	73

⁸⁰³ England and Wales were two separate options in the Questionnaires, United Kingdom (England) and United Kingdom (Wales) respectively. The results from these answers we combined together into England and Wales.

Italy	45	54	62	79
Denmark	27	51	31	73
Sweden	25	49	31	73
Luxembourg	28	36	33	49
Ireland	14	26	19	33
Poland	22	26	28	35
Romania	14	21	20	32
Finland	11	20	14	36
Portugal	15	20	16	28
Greece	14	15	18	19
Hungary	9	14	11	19
Czech Republic	10	11	14	16
Scotland	9	10	12	14
Slovakia	10	10	13	14
Malta	9	9	9	9
Bulgaria	5	8	6	13
Cyprus	8	8	10	10
Lithuania	7	7	10	10
Croatia	6	6	10	11
Slovenia	6	6	9	10
Northern Ireland	6	6	8	9
Latvia	3	3	4	4
Estonia	2	2	4	4
		1066		1501

Q7: How many years of experience in the legal field do you have since you obtained your bachelor degree?

	Completed Questionnaires		Uncompleted Questionnaires	
one year or less	2.42%	8	2.84%	15
up to 3	8.18%	27	10.02%	53
up to 6	18.79%	62	18.53%	98
up to 10	13.33%	44	14.37%	76
11 or more	57.27%	189	54.25%	287
		330		529

Q8: In my opinion, the possibility to choose a court is:

	Completed Questionnaires		Uncompleted Questionnaires	
Very important	50.91%	168	47.00%	227
Important	37.88%	125	39.96%	193
Moderately important	8.79%	29	10.14%	49
Of little importance	0.61%	2	1.24%	6
Unimportant	0.30%	1	0.21%	1
No opinion	1.52%	5	1.45%	7
		330		483

Q9: Considering your work in the last 12 months, how often did you make a choice of court?

	Completed Questionnaires		Uncompleted Questionnaires	
Always	23.6%	78	20.9%	101
Usually	18.2%	60	17.4%	84
Frequently	23.3%	77	22.2%	107
Sometimes	9.4%	31	9.5%	46
Occasionally	10.3%	34	9.5%	46
Rarely	7.3%	24	9.3%	45
Never	6.7%	22	9.9%	48
No opinion	1.2%	4	1.2%	6
				483

Q10: How often do you discuss the choice of court with your client(s)?				
	Completed Questionnaires		Uncompleted Questionnaires	
Every time	16.4%	54	13.3%	64
Usually, in about 90% of the cases	17.3%	57	15.7%	76
Frequently, in about 70% of the cases	18.5%	61	17.0%	82
Sometimes, in about 50% of the cases	16.1%	53	16.1%	78
Occasionally, in about 30% of the cases	12.1%	40	13.5%	65
Rarely, in less than 10% of the cases	14.8%	49	17.4%	84
Never	2.7%	9	4.3%	21
No opinion	2.1%	7	2.7%	13
		330		483

Q11: From your experience, how often the choice of court is made by the client and not by you (lawyer)?				
	Completed Questionnaires		Uncompleted Questionnaires	
Every time	4.8%	16	3.9%	19
Usually, in about 90% of the cases	3.9%	13	5.0%	24
Frequently, in about 70% of the cases	7.6%	25	7.5%	36
Sometimes, in about 50% of the cases	11.8%	39	12.0%	58
Occasionally, in about 30% of the cases	23.0%	76	19.7%	95
Rarely, in less than 10% of the cases	35.5%	117	35.8%	173
Never	6.4%	21	7.5%	36
No opinion	7.0%	23	8.7%	42
		330		483

Q12: From your experience, how often do clients follow your advice on the choice of court?				
	Completed Questionnaires		Uncompleted Questionnaires	
Every time	18.8%	62	18.6%	90
Usually, in about 90% of the cases	55.5%	183	54.5%	263
Frequently, in about 70% of the cases	14.5%	48	13.3%	64
Sometimes, in about 50% of the cases	2.7%	9	2.9%	14
Occasionally, in about 30% of the cases	0.6%	2	0.6%	3
Rarely, in less than 10% of the cases	0.9%	3	1.0%	5
Never	0.0%	0	0.0%	0
No opinion	7.0%	23	9.1%	44
		330		483

Q13: Is your choice influenced more by substantive law or procedural law?				
	Completed Questionnaires		Uncompleted Questionnaires	
Substantive law	18	5.45%	27	5.59%
Mostly substantive law	80	24.24%	106	21.95%
Somewhat substantive law	21	6.36%	33	6.83%
Equally substantive law and procedural law	114	34.55%	161	33.33%
Somewhat procedural law	17	5.15%	24	4.97%
Mostly procedural law	48	14.55%	66	13.66%
Procedural law	8	2.42%	13	2.69%
N/A	24	7.27%	53	10.97%
	330	100.00%	483	100.00%

Q14: In your opinion, which jurisdictions in the EU have the most attractive civil justice system with regard to court litigation?						
Answer Options	Most attractive		2 nd most attractive		3 rd most attractive	
Germany	115	31.5%	61	18.1%	43	15.1%
England and Wales ⁸⁰⁴	92	25.2%	75	22.3%	48	16.8%
Netherlands	42	11.5%	57	16.9%	30	10.5%
(None)	29	7.9%	35	10.4%	58	20.4%
Denmark	25	6.8%	8	2.4%	11	3.9%
Sweden	16	4.4%	26	7.7%	17	6.0%
France	13	3.6%	11	3.3%	23	8.1%
Austria	9	2.5%	33	9.8%	14	4.9%
Luxembourg	7	1.9%	5	1.5%	8	2.8%
Ireland	5	1.4%	5	1.5%	6	2.1%
Finland	3	0.8%	3	0.9%	4	1.4%
Spain	3	0.8%	4	1.2%	6	2.1%
Belgium	2	0.5%	3	0.9%	6	2.1%
Hungary	1	0.3%	1	0.3%	0	0.0%
Italy	1	0.3%	3	0.9%	1	0.4%
Poland	1	0.3%	1	0.3%	0	0.0%
Slovenia	1	0.3%	0	0.0%	0	0.0%
Bulgaria	0	0.0%	1	0.3%	0	0.0%
Cyprus	0	0.0%	0	0.0%	0	0.0%
Croatia	0	0.0%	0	0.0%	0	0.0%
Czech Republic	0	0.0%	0	0.0%	0	0.0%
Estonia	0	0.0%	0	0.0%	0	0.0%
Greece	0	0.0%	0	0.0%	0	0.0%
Latvia	0	0.0%	0	0.0%	1	0.4%
Lithuania	0	0.0%	0	0.0%	0	0.0%
Malta	0	0.0%	1	0.3%	0	0.0%
Portugal	0	0.0%	0	0.0%	0	0.0%

⁸⁰⁴ England and Wales were two separate options in the Questionnaires, United Kingdom (England) and United Kingdom (Wales) respectively. The results from these answers we combined together into England and Wales.

Romania	0	0.0%	0	0.0%	1	0.4%
Slovakia	0	0.0%	0	0.0%	0	0.0%
Northern Ireland	0	0.0%	2	0.6%	4	1.4%
Scotland	0	0.0%	2	0.6%	4	1.4%
	365		337		285	

Q14: In your opinion, which jurisdictions in the EU have the most attractive civil justice system with regard to court litigation?
(Controlled for home jurisdiction)

Answer Options	Most attractive		2 nd most attractive		3 rd most attractive	
Germany	33	22.3%	52	18.2%	40	17.4%
England and Wales ⁸⁰⁵	63	42.6%	69	24.1%	46	20.0%
Netherlands	8	5.4%	48	16.8%	0	0.0%
(None)	29	19.6%	35	12.2%	58	25.2%
Denmark	1	0.7%	8	2.8%	9	3.9%
Sweden	2	1.4%	18	6.3%	15	6.5%
France	5	3.4%	10	3.5%	22	9.6%
Austria	4	2.7%	32	11.2%	12	5.2%
Luxembourg	3	2.0%	3	1.0%	7	3.0%
Ireland	0	0.0%	1	0.3%	1	0.4%
Finland	0	0.0%	2	0.7%	3	1.3%
Spain	0	0.0%	1	0.3%	3	1.3%
Belgium	0	0.0%	3	1.0%	6	2.6%
Hungary	0	0.0%	0	0.0%	0	0.0%
Italy	0	0.0%	1	0.3%	0	0.0%
Poland	0	0.0%	0	0.0%	0	0.0%
Slovenia	0	0.0%	0	0.0%	0	0.0%
Bulgaria	0	0.0%	0	0.0%	0	0.0%
Cyprus	0	0.0%	0	0.0%	0	0.0%

⁸⁰⁵ England and Wales were two separate options in the Questionnaires, United Kingdom (England) and United Kingdom (Wales) respectively. The results from these answers we combined together into England and Wales.

Croatia	0	0.0%	0	0.0%	0	0.0%
Czech Republic	0	0.0%	0	0.0%	0	0.0%
Estonia	0	0.0%	0	0.0%	0	0.0%
Greece	0	0.0%	0	0.0%	0	0.0%
Latvia	0	0.0%	0	0.0%	1	0.4%
Lithuania	0	0.0%	0	0.0%	0	0.0%
Malta	0	0.0%	1	0.3%	0	0.0%
Portugal	0	0.0%	0	0.0%	0	0.0%
Romania	0	0.0%	0	0.0%	0	0.0%
Slovakia	0	0.0%	0	0.0%	0	0.0%
Northern Ireland	0	0.0%	2	0.7%	4	1.7%
Scotland	0	0.0%	0	0.0%	3	1.3%
	148		286		230	

Q15: Bearing in mind the jurisdictions that you consider attractive, in your opinion, what are the elements/factors that make these jurisdictions attractive?

	Completed surveys			Including uncompleted surveys		
Answer Options	1 st important	2 nd important	3 rd important	1 st important	2 nd important	3 rd important
Quality of judges and courts	54	40	44	60	41	46
Predictability of the outcome	39	27	27	40	29	29
Familiarity with the jurisdiction	31	17	11	34	17	12
Client's familiarity with the jurisdiction	30	12	11	31	20	13
Speed of the dispute resolution	27	38	42	30	39	43
Availability of certain measures/injunctions	25	23	15	27	25	16

A common practice of choosing that court	18	8	4	23	9	5
Common knowledge that the court is good	17	14	17	17	14	19
Enforcement possibilities in that jurisdiction	16	24	21	16	27	25
Fairness of the outcome	14	23	17	14	25	17
Lack of corruption	13	16	9	16	17	12
(None)	12	11	11	17	15	16
Neutrality	10	18	12	12	19	15
Language of the court (proceeding)	9	11	18	9	13	20
Low court and procedural fees (costs in general)	6	13	17	7	14	17
Previous experience with the court	3	7	6	5	8	6
Proximity to business partners (notaries, bailiffs, financial advisors)	2	1	2	2	2	3
The presence of a branch of our law firm (or partner law firm)	2	0	4	2	0	4
Lack of bureaucracy	1	9	10	2	9	10
The distance between the court and my location	1	0	6	1	1	6
Proximity to financial centres/hubs	0	1	4	0	1	4
Quality of local lawyers	0	8	7	0	8	8
	330	321	315	365	353	346

Q16: In your opinion, which jurisdictions in the EU have the least attractive civil justice system as regards litigation proceedings?			
Answer Options	Least attractive	2 nd least attractive	3 rd least attractive
Italy	98	31	26
(None)	81	67	80
Romania	47	42	27
Greece	35	38	19
Bulgaria	34	28	20
Hungary	9	12	12
England and Wales ⁸⁰⁶	9	12	14
Spain	8	17	7
Cyprus	6	5	8
France	6	11	12
Poland	4	6	7
Portugal	4	3	8
Croatia	3	2	9
Luxembourg	3	1	2
Slovenia	3	3	3
Belgium	2	4	4
Germany	2	2	2
Malta	2	3	4
Slovakia	2	3	8
Austria	1	1	0
Czech Republic	1	4	4
Finland	1	0	0
Ireland	1	0	1
Latvia	1	2	0
Lithuania	1	1	5
Northern Ireland	1	0	0

⁸⁰⁶ England and Wales were two separate options in the Questionnaires, United Kingdom (England) and United Kingdom (Wales) respectively. The results from these answers we combined together into England and Wales.

Denmark	0	1	0
Estonia	0	2	0
Netherlands	0	2	1
Sweden	0	0	1
Scotland	0	0	1
	365	303	285

Q17: Bearing in mind the jurisdictions that you consider least attractive, in your opinion what are the elements/factors that make these jurisdictions less attractive?						
	Completed surveys			Including Uncompleted surveys		
Answer Options	Most important	2 nd most important	3 rd most important	Most important	2 nd most important	3 rd most important
Slow pace of the dispute resolution	80	54	37	85	56	37
Presence of corruption	53	29	26	57	31	28
(None)	35	30	37	46	38	46
Lack of quality of judges and courts	27	26	12	27	29	13
Presence of bureaucracy	25	27	11	27	30	14
Lack of neutrality	23	31	6	26	33	7
Unpredictability of the outcome	23	38	52	24	41	53
Client's unfamiliarity with the jurisdiction	12	8	10	15	8	10
High court and procedural fees (costs in general)	10	10	9	10	10	10
Lack of enforcement possibilities in that jurisdiction	10	10	9	12	10	9

Unfamiliarity with the jurisdiction	10	8	17	11	8	18
Common knowledge that the court/jurisdiction is not good	9	7	8	9	7	9
A common practice of not choosing that court/jurisdiction	5	0	2	5	0	3
Unfairness of the outcome	3	8	19	3	9	20
Availability of certain (negative) measures/injunctions	2	3	3	3	3	3
Previous experience with the court	2	3	5	3	3	6
The court/proceeding is in a language I am not used	1	7	13	2	9	13
Distance from business partners (notaries, bailiffs, financial advisors)	0	1	2	0	1	2
Distance to financial centres/hubs	0	2	0	0	3	0
Lack of quality of local lawyers	0	1	6	0	1	7
The absence of a branch of our law firm (or partner law firm)	0	1	0	0	2	2
The distance between the court and my location	0	1	2	0	1	2
	330	305	286	365	333	312

Q18: How influential are the following elements/factors when you make a choice of court?							
Answer Options	Not at all	Slightly	Some-what	Very	Extremely	N/A	Response Count
Quality of judges and courts	3	8	22	115	160	19	327
Lack of corruption	10	9	30	78	179	17	323
Neutrality	9	6	37	118	140	18	328
Speed of the dispute resolution	4	6	44	128	128	17	327
Enforcement possibilities in that jurisdiction	4	15	42	112	145	13	331
Predictability of the outcome	6	10	37	124	132	18	327
Fairness of the outcome	7	8	48	118	129	16	326
Familiarity with the jurisdiction	6	18	60	131	102	10	327
Common knowledge that the court is good	7	12	68	163	70	11	331
Quality of local lawyers	15	26	67	126	77	16	327
Previous experience with the court	6	31	83	137	58	14	329
Availability of certain measures/injunctions	7	29	95	132	51	16	330
Lack of bureaucracy	8	29	102	120	53	14	326
Client's familiarity with the jurisdiction	13	38	85	121	60	13	330

Language of the court (proceeding)	18	40	86	106	66	14	330
A common practice of choosing that court	26	52	99	101	36	16	330
Low court and procedural fees (costs in general)	26	64	120	76	28	14	328
Proximity to business partners (notaries, bailiffs, financial advisors)	45	112	92	47	15	17	328
Proximity to financial centres/hubs	73	115	81	28	12	19	328
The distance between the court and my location	92	99	75	32	12	17	327
The presence of a branch of our law firm (or partner law firm)	111	80	55	43	17	24	330
Other (please specify)							6

Q19: How influential are the following elements/factors when you avoid a certain court?							
Answer Options	Not at all	Slightly	Some-what	Very	Extrem-ely	N/A	Response Count
Presence of corruption	6	4	18	53	208	36	325
Lack of neutrality	7	4	25	75	186	31	328

Lack of quality of judges and courts	4	8	19	94	171	29	325
Unfairness of the outcome	7	11	30	101	144	32	325
Unpredictability of the outcome	6	12	42	97	143	26	326
Slow pace of the dispute resolution	5	7	48	112	124	25	321
Lack of enforcement possibilities in that jurisdiction	5	19	39	100	137	26	326
Common knowledge that the court/jurisdiction is not good	4	20	62	126	89	27	328
Presence of bureaucracy	7	23	83	112	73	29	327
Lack of quality of local lawyers	13	29	74	102	76	30	324
Previous experience with the court	11	37	80	114	55	25	322
Unfamiliarity with the jurisdiction	12	48	100	87	54	24	325
High court and procedural fees (costs in general)	21	59	100	83	40	23	326
Availability of certain (negative) measures/injunctions	16	58	114	86	23	30	327
Client's unfamiliarity with the jurisdiction	23	67	98	83	32	23	326

The court/proceeding is in a language I am not used	41	70	77	72	38	28	326
A common practice of not choosing that court/jurisdiction	35	75	96	73	16	34	329
Distance from business partners (notaries, bailiffs, financial advisors)	87	99	75	29	9	28	327
The absence of a branch of our law firm (or partner law firm)	103	85	73	29	5	31	326
The distance between the court and my location	103	98	57	31	6	28	323
Distance to financial centres/hubs	102	107	63	17	7	30	326
Other (please specify)							3

Q20: According to you, which of the following jurisdictions in the EU actively attracts litigants in (promotes) its court system?		
	Responses	Controlled for home jurisdiction
England and Wales ⁸⁰⁷	238	211
Germany	114	65
Netherlands	101	72
(None)	53	53

⁸⁰⁷ England and Wales were two separate options in the Questionnaires, United Kingdom (England) and United Kingdom (Wales) respectively. The results from these answers we combined together into England and Wales.

Sweden	36	25
Austria	30	28
Luxembourg	29	27
France	26	22
Ireland	16	12
Belgium	11	10
Denmark	8	7
Northern Ireland	6	6
Scotland	6	6
Finland	5	5
Cyprus	2	2
Slovenia	2	2
Spain	2	0
Estonia	1	1
Malta	1	1
Italy	1	0
Croatia	0	0
Latvia	0	0
Lithuania	0	0
Slovakia	0	0
Czech Republic	0	0
Greece	0	0
Bulgaria	0	0
Poland	0	0
Hungary	0	0
Portugal	0	0
Romania	0	0

Q21: The differences between civil law courts and common law courts are considerable.	
Strongly disagree	2
Disagree	7
Somewhat disagree	20
Neither agree nor disagree	28
Somewhat agree	52
Agree	137
Strongly agree	70
N/A	14
Response Count	330

Q22: It is easier to litigate in a common law country than in a civil law country.	
Strongly disagree	36
Disagree	75
Somewhat disagree	34
Neither agree nor disagree	90
Somewhat agree	29
Agree	30
Strongly agree	6
N/A	30
Response Count	330

Q23: Generally, courts in Western Europe are more reliable than courts in Eastern Europe.	
Strongly disagree	2
Disagree	3
Somewhat disagree	7
Neither agree nor disagree	39
Somewhat agree	75
Agree	124
Strongly agree	56

N/A	24
Rating Average	5.54
Response Count	330

Q24: Generally, courts in Northern Europe are more efficient, in terms of proceeding time, review of documents and response time, compared to courts in Southern Europe.	
Strongly disagree	2
Disagree	7
Somewhat disagree	5
Neither agree nor disagree	29
Somewhat agree	65
Agree	126
Strongly agree	73
N/A	23
Response Count	330

Survey Questionnaire

Survey on the choice of court in the European Union

About the survey

Dear respondent,

We, Prof. Xandra Kramer and Erlis Themeli, PhD researcher, from the Erasmus School of Law Rotterdam (the Netherlands) are conducting this survey as part of a research on the choice of court in the EU. This survey is part of our research project that aims at understanding the preferences of lawyers in making choice of courts and the responses of governments thereto. The focus of this survey is the practice of choice of court by leading lawyers and law firms in the EU. In the key European instrument, the Brussels I Regulation (recast), the choice of court is well regulated and guaranteed in the European Union. In recent years, a number of Member States have engaged in the promotion of their jurisdictions as venues where to conduct court litigation. The interaction between the choices made by lawyers and the readiness of governments to attract them, needs further studies to facilitate governments' resource allocation and to help lawyers better develop their choice of court strategies.

Your responses to this survey will be used to understand the preferences of lawyers as regards jurisdictions as well as elements they appreciate when choosing Member States' courts. Our study aims at contributing to the academic debate by gathering and analysing new data and to a more comprehensive treatment of the topic. The results of the survey along with a theoretical analysis will be published late 2016.

We will protect your privacy and treat the responses to this survey as confidential. The individual information you provide will be used for academic research purposes only and will not be released to any third party.

Should you require further information on this survey or the research please contact:

Prof. dr. Xandra Kramer: kramer@law.eur.nl

Erlis Themeli, LLM: themeli@law.eur.nl

We thank you for taking part in this survey.

Part 1 - About you

This part contains questions related to your professional and educational background.

* 1. What is your current job position in your law firm?

- ☐ Junior Associate
- ☐ Associate
- ☐ Senior Associate
- ☐ Partner
- ☐ Counsel
- ☐ Of Counsel
- ☐ Other (please specify)

* 2. What field of law do you work in? (Please, indicate the field of law that you predominantly are involved in, e.g.: IP law, Energy, financial institutions.)

* 3. In which official languages of the EU do you have full professional proficiency? (More than one option possible.)

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☐ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian

- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* 4. In which jurisdiction(s) did you graduate? (Please, include the jurisdictions where you obtained your bachelor, master, doctoral degree or other university degree.)

- ☐ Jurisdiction(s) of bachelor graduation:
- ☐ Jurisdiction(s) of master graduation:
- ☐ Jurisdiction(s) of doctoral degree:
- ☐ Jurisdiction(s) of other university degree:

* 5. In which jurisdiction in the European Union do you mainly operate? (Please, indicate the jurisdiction where you conduct the majority of your professional activity.)

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Cyprus
- ☐ Croatia
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania

- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovakia
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom (England)⁸⁰⁸
- ☐ United Kingdom (Northern Ireland)
- ☐ United Kingdom (Scotland)
- ☐ United Kingdom (Wales)
- ☐ Other (please specify)

* 6. With which EU Member States' court(s) do you have a professional experience? (More than one choice possible. If you would like to mention experiences outside the EU, please specify in Other.)

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Cyprus
- ☐ Croatia
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg

⁸⁰⁸ England and Wales were given as United Kingdom (England) and United Kingdom (Wales) in the questionnaire. Responses for both of them were combined together for the analysis.

- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovakia
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom (England)⁸⁰⁹
- ☐ United Kingdom (Northern Ireland)
- ☐ United Kingdom (Scotland)
- ☐ United Kingdom (Wales)
- ☐ Other (please specify)

* 7. How many years of experience in the legal field do you have since you obtained your bachelor degree? (Please, indicate the total number of years in the legal field, i.e. practicing lawyer, judge, in-house, academic field, etc.)

- ☐ one year or less
- ☐ up to 3
- ☐ up to 6
- ☐ up to 10
- ☐ 11 or more

⁸⁰⁹ England and Wales were given as United Kingdom (England) and United Kingdom (Wales) in the questionnaire. Responses for both of them were combined together for the analysis.

Part 2 – Choice of court for dispute resolution

This part contains question related to the choice of court process.

* 8. In my opinion, the possibility to choose a court is:

- ☐ Very important
- ☐ Important
- ☐ Moderately important
- ☐ Of little importance
- ☐ Unimportant
- ☐ No opinion
- ☐ Comment (please let us know any comment to this question or to your response)

* 9. Considering your work in the last 12 months, how often did you make a choice of court? (Please consider as relevant the cases when you prepared a legal opinion, drafted a choice of court clause in a contract or chose a court where to submit your litigation case.)

- ☐ Always
- ☐ Usually
- ☐ Frequently
- ☐ Sometimes
- ☐ Occasionally
- ☐ Rarely
- ☐ Never
- ☐ No opinion
- ☐ Comment (please let us know any comment to this question or to your response)

* 10. How often do you discuss the choice of court with your client(s)?

- ☐ Every time
- ☐ Usually, in about 90% of the cases
- ☐ Frequently, in about 70% of the cases
- ☐ Sometimes, in about 50% of the cases
- ☐ Occasionally, in about 30% of the cases
- ☐ Rarely, in less than 10% of the cases
- ☐ Never

- ☐ No opinion
- ☐ Comment (please let us know any comment to this question or to your response)

* 11. From your experience, how often the choice of court is made by the client and not by you (lawyer)?

- ☐ Every time
- ☐ Usually, in about 90% of the cases
- ☐ Frequently, in about 70% of the cases
- ☐ Sometimes, in about 50% of the cases
- ☐ Occasionally, in about 30% of the cases
- ☐ Rarely, in less than 10% of the the cases
- ☐ Never
- ☐ No opinion
- ☐ Comment (please let us know any comment to this question or to your response)

* 12. From your experience, how often do clients follow your advice on the choice of court?

- ☐ Every time
- ☐ Usually, in about 90% of the cases
- ☐ Frequently, in about 70% of the cases
- ☐ Sometimes, in about 50% of the cases
- ☐ Occasionally, in about 30% of the cases
- ☐ Rarely, in less than 10% of the cases
- ☐ Never
- ☐ No opinion
- ☐ Comment (please let us know any comment to this question or to your response)

* 13. In general, when you make a choice of court, is your choice influenced more by the substantive law or the procedural law of that jurisdiction?

- ☐ Substantive law
- ☐ Mostly substantive law
- ☐ Somewhat substantive law
- ☐ Equally substantive law and procedural law
- ☐ Somewhat procedural law
- ☐ Mostly procedural law

- ☐ Procedural law
- ☐ N/A
- ☐ Comment (please let us know any comment to this question or to your response)

* 14. In your opinion, which jurisdictions in the EU have the most attractive civil justice system with regard to court litigation? (Please rank the best three. If you would like to mention jurisdictions outside the EU, please specify in Comment.)

(Options: Austria – Belgium – Bulgaria – Cyprus – Croatia – Czech Republic – Denmark – Estonia – Finland – France – Germany – Greece – Hungary – Ireland – Italy – Latvia – Lithuania – Luxembourg – Malta – Netherlands – Poland – Portugal – Romania – Slovakia – Slovenia – Spain – Sweden – United Kingdom (England)⁸¹⁰ – United Kingdom (Northern Ireland) – United Kingdom (Scotland) – United Kingdom (Wales))

- ☐ Most attractive
- ☐ 2nd most attractive
- ☐ 3rd most attractive
- ☐ Comment (please let us know any comment to this question or to your response)

* 15. Bearing in mind the jurisdictions that you consider attractive, in your opinion, what are the elements/factors that make these jurisdictions attractive? (Please select the three most important elements.)

(Elements: A common practice of choosing that court - Availability of certain measures/injunctions - Client's familiarity with the jurisdiction - Common knowledge that the court is good - Enforcement possibilities in that jurisdiction - Fairness of the outcome - Familiarity with the jurisdiction - Lack of bureaucracy - Lack of corruption - Language of the court (proceeding) - Low court and procedural fees (costs in general) – Neutrality - Predictability of the outcome - Previous experience with the court - Proximity to business partners (notaries, bailiffs, financial advisors) - Proximity to financial centres/hubs - Quality of judges and courts - Quality of local lawyers - Speed of the dispute resolution - The distance between the court and my location - The presence of a branch of our law firm (or partner law firm) – (none))

⁸¹⁰ England and Wales were given as United Kingdom (England) and United Kingdom (Wales) in the questionnaire. Responses for both of them were combined together for the analysis.

- ☐ Most important
- ☐ 2nd most important
- ☐ 3rd most important
- ☐ Comment (please let us know any comment to this question or to your response)

* 16. In your opinion, which jurisdictions in the EU have the least attractive civil justice system as regards litigation proceedings? (Please rank the least attractive. If you would like to mention jurisdictions outside the EU, please specify in Comment.)

(Options: Austria – Belgium – Bulgaria – Cyprus – Croatia – Czech Republic – Denmark – Estonia – Finland – France – Germany – Greece – Hungary – Ireland – Italy – Latvia – Lithuania – Luxembourg – Malta – Netherlands – Poland – Portugal – Romania – Slovakia – Slovenia – Spain – Sweden – United Kingdom (England)⁸¹¹ – United Kingdom (Northern Ireland) – United Kingdom (Scotland) – United Kingdom (Wales))

- ☐ Least attractive
- ☐ 2nd least attractive
- ☐ 3rd least attractive
- ☐ Comment (please let us know any comment to this question or to your response)

* 17. Bearing in mind the jurisdictions that you consider least attractive, in your opinion what are the elements/factors that make these jurisdictions less attractive? (Please choose the three most important elements.)

(Elements: A common practice of not choosing that court/jurisdiction - Availability of certain (negative) measures/injunctions - Client's unfamiliarity with the jurisdiction - Common knowledge that the court/jurisdiction is not good - Distance from business partners (notaries, bailiffs, financial advisors) - Distance to financial centres/hubs - High court and procedural fees (costs in general) - Lack of enforcement possibilities in that jurisdiction - Lack of neutrality - Lack of quality of judges and courts - Lack of quality of local lawyers - Presence of bureaucracy - Presence of corruption - Previous experience with the court - Slow pace of the dispute resolution - The absence of a branch of our law firm (or partner law firm) - The court/proceeding is in a language I am not used - The distance

⁸¹¹ England and Wales were given as United Kingdom (England) and United Kingdom (Wales) in the questionnaire. Responses for both of them were combined together for the analysis.

between the court and my location - Unfairness of the outcome - Unfairness of the outcome⁸¹² - Unfamiliarity with the jurisdiction - Unpredictability of the outcome – (none)

- ☐ Most important
- ☐ 2nd most important
- ☐ 3rd most important
- ☐ Comment (please let us know any comment to this question or to your response)

* 18. How influential are the following elements/factors when you make a choice of court?

(Options: Not at all influential - Slightly influential - Somewhat influential - Very influential - Extremely influential - N/A)

- ☐ A common practice of choosing that court
- ☐ Availability of certain measures/injunctions
- ☐ Client's familiarity with the jurisdiction
- ☐ Common knowledge that the court is good
- ☐ Enforcement possibilities in that jurisdiction
- ☐ Fairness of the outcome
- ☐ Familiarity with the jurisdiction
- ☐ Lack of bureaucracy
- ☐ Lack of corruption
- ☐ Language of the court (proceeding)
- ☐ Low court and procedural fees (costs in general)
- ☐ Neutrality
- ☐ Predictability of the outcome
- ☐ Previous experience with the court
- ☐ Proximity to business partners (notaries, bailiffs, financial advisors)
- ☐ Proximity to financial centres/hubs
- ☐ Quality of judges and courts
- ☐ Quality of local lawyers
- ☐ Speed of the dispute resolution
- ☐ The distance between the court and my location
- ☐ The presence of a branch of our law firm (or partner law firm)
- ☐ Other (please specify)

⁸¹² 'Unfairness of the outcome' options was given two times. Responses for both of were combined together for the analysis.

* 19. How influential are the following elements/factors when you avoid a certain court?

(Options: Not at all influential - Slightly influential - Somewhat influential - Very influential - Extremely influential - N/A)

- ☐ A common practice of not choosing that court/jurisdiction
- ☐ Availability of certain (negative) measures/injunctions
- ☐ Client's unfamiliarity with the jurisdiction
- ☐ Common knowledge that the court/jurisdiction is not good
- ☐ Distance from business partners (notaries, bailiffs, financial advisors)
- ☐ Distance to financial centres/hubs
- ☐ High court and procedural fees (costs in general)
- ☐ Lack of enforcement possibilities in that jurisdiction
- ☐ Lack of neutrality
- ☐ Lack of quality of judges and courts
- ☐ Lack of quality of local lawyers
- ☐ Presence of bureaucracy
- ☐ Presence of corruption
- ☐ Previous experience with the court
- ☐ Slow pace of the dispute resolution
- ☐ The absence of a branch of our law firm (or partner law firm)
- ☐ The court/proceeding is in a language I am not used
- ☐ The distance between the court and my location
- ☐ Unfairness of the outcome
- ☐ Unfairness of the outcome⁸¹³
- ☐ Unfamiliarity with the jurisdiction
- ☐ Unpredictability of the outcome
- ☐ Other (please specify)

⁸¹³ 'Unfairness of the outcome' options was given two times. Responses for both of were combined together for the analysis.

Part 3 – Your general view on the civil justice systems in the EU

This part contains general questions related to the court system and civil procedural setting in EU Member States and your view on them. Please indicate how much you disagree or agree with the statements below, based on your personal experience or perception.

* 20. According to you, which of the following jurisdictions in the EU actively attracts litigants in (promotes) its court system? (Multiple choice possible. If you would like to mention jurisdictions outside the EU, please specify in Comment.)

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Cyprus
- ☐ Croatia
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovakia
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden

- ☐ United Kingdom (England)⁸¹⁴
- ☐ United Kingdom (Northern Ireland)
- ☐ United Kingdom (Scotland)
- ☐ United Kingdom (Wales)
- ☐ (None)
- ☐ Comment (please let us know any comment to this question or to your response)

* 21. The differences between civil law courts and common law courts are considerable.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Somewhat disagree
- ☐ Neither agree nor disagree
- ☐ Somewhat agree
- ☐ Agree
- ☐ Strongly agree
- ☐ N/A
- ☐ Comment (please let us know any comment to this question or to your response)

* 22. It is easier to litigate in a common law country than in a civil law country.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Somewhat disagree
- ☐ Neither agree nor disagree
- ☐ Somewhat agree
- ☐ Agree
- ☐ Strongly agree
- ☐ N/A
- ☐ Comment (please let us know any comment to this question or to your response)

⁸¹⁴ England and Wales were given as United Kingdom (England) and United Kingdom (Wales) in the questionnaire. Responses for both of them were combined together for the analysis.

* 23. Generally, courts in Western Europe are more reliable than courts in Eastern Europe.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Somewhat disagree
- ☐ Neither agree nor disagree
- ☐ Somewhat agree
- ☐ Agree
- ☐ Strongly agree
- ☐ N/A
- ☐ Comment (please let us know any comment to this question or to your response)

* 24. Generally, courts in Northern Europe are more efficient, in terms of proceeding time, review of documents and response time, compared to courts in Southern Europe.

- ☐ Strongly disagree
- ☐ Disagree
- ☐ Somewhat disagree
- ☐ Neither agree nor disagree
- ☐ Somewhat agree
- ☐ Agree
- ☐ Strongly agree
- ☐ N/A
- ☐ Comment (please let us know any comment to this question or to your response)

Part 4 – End of the survey and final remarks

25. Please enter your e-mail if you are available for clarifications or a short interview.

26. Please enter your e-mail if you would like to receive an overview of the results of the survey.

27. Do you have any comment on the topic of this survey or the survey itself?

Curriculum Vitae

Erlis Themeli

Erlis Themeli (1983) graduated from the Faculty of Law, University of Tirana in 2006. From 2005 until 2007, Erlis worked as an associated lawyer for the law firm Kalo & Associates, and in 2007, he became member of the Albanian Bar Association. As lawyer, Erlis was specialised in banking law and litigation. Attracted by new challenges, during 2008-2011, Erlis worked at the High Council of Justice in Albania, a constitutional institution charged with the appointment, dismissal, and disciplinary proceeding of judges. At the High Council of Justice, Erlis was head of the projects sector, and for a time, acting director of the legal department. In 2010, he conducted an internship at the Ministry of Justice of Hamburg, Germany, with a scholarship from the European Fund for the Balkans.

In 2012, Erlis obtained his master degree in International and Comparative Private Law from the University of Groningen, the Netherlands. This master studies was financed by a scholarship of the European Union through the JoinEuSee programme. The same year, Erlis started his PhD studies. This book is his crown achievement and the result of four years of intensive research. Since September 2017, Erlis started working as a postdoc, conducting research on the digitalisation of justice, as part of a broader project on future challenges to civil procedure in Europe.

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Portfolio

Scientific publications:

Kramer, Xandra and **Erlis Themeli**, 'The Party Autonomy Paradigm: European and Global Developments on Choice of Forum' in Lazić, Vesna and Steven Stuij (eds), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (Asser Press, The Hague 2017).

Themeli, Erlis, 'Sculpturing adjudication as a public good: Competition between jurisdictions as a modelling factor' in Duchateau, Michiel and others (eds), *Evolution in Dispute Resolution: From Adjudication to ADR* (Eleven International Publishing, The Hague 2016).

Editorship:

Themeli, Erlis and Pannebakker, Ekaterina (eds.), *Academic Poster Presentation: Workshop proceedings* (Erasmus School of Law, Rotterdam 2016).

Lectures, presentations and contributions to the academic forum:

"A Survey on the Choice of Court in the EU: Implications for the civil justice system competition" Presentation at the 'Transformation of Civil Justice: Unity and Diversity' Conference, Inter University Centre Dubrovnik, Croatia, May 2017.

"Choice of court and the competition of jurisdictions in the European Union" Guest lecturer European Private International Law course, Erasmus University Rotterdam, March 2017.

"Conflict of laws and international litigation: Competition of civil justice systems" Guest lecturer Arbitration and Business Law LLM master, Erasmus University Rotterdam, 2014 - 2017.

"Bending the rules: How the market for lawyers may distort the civil justice systems competition" Paper presented at the Economic Analysis of Litigation Workshop 2015, Turin, Italy.

"Hijacking lawyers: lawyers' power in the demand side of the civil justice competition" Paper presented at the Atlas Agora Summer School 2015, Montreal, Canada.

"Choice dilemmas in the competition of civil justice systems" Poster presented at the Erasmus Graduate School of Law Poster Presentation 2015, Rotterdam, the Netherlands. Awarded with the "Best Poster Presentation 2015" Prize.

“Can competition change the nature of adjudication as a public good?”
Presentation at the “Second annual PhD roundtable forum on law and governance 2014” of the Netherlands Institute of Law and Governance, Groningen, the Netherlands.

“Competition of Civil Justice Systems in the EU” Poster presented at the Early Career Researcher Poster Competition 2014, Edinburgh, United Kingdom.

“A study on the competition of civil justice systems” Paper presentation at the Leuven Ius Commune Masterclass 2013, Leuven, Belgium.

“Understanding the mechanics of competition between jurisdictions with the help of an empirical study” Presentation at the 2013 Empirical Legal Studies seminars of the Erasmus School of Law, Rotterdam, the Netherlands.

Miscellaneous (research projects, awards, distinctions, other evidence of reputation):

Winner of the Erasmus Graduate School of Law 2015 Call for Ideas

Winner of the Erasmus Graduate School of Law Poster Presentation 2015

2012 International Alumni Ambassador, University of Groningen, the Netherlands

2012 Scholarship for master studies, *JoinEuSee Project*

Fellowship Award “2010 Programme for Young Government Officials from Western Balkans”, *Behörde für Justiz und Gleichstellung Hamburg*

Grant Applications and funding:

Winner of the Erasmus Graduate School of Law 2015 Call for Ideas (€5,000)

Winner of the Erasmus Graduate School of Law Poster Presentation 2015 (€500)

2012 Scholarship for master studies, *JoinEuSee Project*

Fellowship Award “2010 Programme for Young Government Officials from Western Balkans”, *Behörde für Justiz und Gleichstellung Hamburg*

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My supervisors Xandra and Martijn followed in detail my work during these years, which helped both my academic and private life. I am grateful to Martijn for his practical insights and encouragements. The support Xandra provided during these years was enormous, any description would be an injustice to the kindness she transmitted.

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